No. 94.

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Brief of Mayne for Appellants

In the Supreme Court of the United States,

OCTOBER TERM, 1897.

Filed Jan. 17, 1898.

NO. 94.

ELIZABETH WETZEL ET AL., APPELLANTS,

VS.

THE MINNESOTA RAILWAY TRANSFER COMPANY ET AL.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

Brief of Appellants.

WILLIAM C. MAYNE,
of Counsel for Appellants.

EDWARDS & BROUGHTON, PRINTERS AND BINDERS, RALEIGH

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vs.

THE MINNESOTA RAILWAY TRANSFER CO. ET AL.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR APPELLANTS.

I.

STATEMENT OF THE CASE.

The appellants, as plaintiffs, filed their bill in the Circuit Court, District of Minnesota, Third Division, on the 28th day of May, A. D. 1892, against the appellees, the defendants named therein, setting forth *inter alia*: That one George W. Remsen became in his lifetime duly entitled to a land warrant for enlistment and services in the United States Army, under the terms of the Act of Congress, approved on the 11th day of February, A. D. 1847, and being so entitled to said land warrant died; and that after his death, and on the 30th day of February, A. D. 1848, the Government duly issued its land warrant, No. 28811, for one hundred and sixty acres of land, in the name of Elizabeth Remsen, widow, Harriet A. Remsen, Mary Ann Remsen, John Wesley Remsen, Elizabeth Remsen and George W. A. Remsen, children and heirs-at-law of said George W. Remsen, deceased; and that at the time of the issuance of said land warrant and its transferance all of said chil-

dren were minors, under the age of fourteen years, except Harriet A. Remsen, who was seventeen years of age. And that on the 6th day of October, 1848, the said Elizabeth Remsen, widow, was duly appointed the guardian of the persons and estates of all of said minors, except the said Harriet A. Remsen, by the Orphans' Court of Philadelphia, Pennsylvania, which had jurisdiction to appoint said guardian.

And that on the 11th day of October, 1848, at Philadelphia, the said Elizabeth Remsen, for herself and as the guardian aforesaid, joined with said Harriet A. Remsen, and together attempted to assign said land warrant by a written instrument (a copy of which is set forth on page 15 of the record) to one Nathan C. D. Taylor.

And that said Taylor, as the assignee as aforesaid, located said land warrant on the property, the subject-matter of the suit, on or about the 20th day of March, 1850; and thereafter the Government issued its patent therefor, dated the 20th of March, 1850, to said Taylor, as the assignee of said Elizabeth Remsen, in her own right and as guardian of said minor heirs of said George W. Remsen, deceased. (A copy of said patent is set forth on page 16 of the record.)

And that thereafter said Taylor recorded said patent in the county, the situs of the land, and executed divers and sundry conveyances of said lands, or of different parts thereof, by which he conveyed all his right, title and interest therein to sundry and divers persons, so that by said conveyances or a chain of conveyances, originating as aforesaid, have passed to and now owned by the defendants, who now claim to be the sole and absolute owners thereof, by a chain of titles originating with said Taylor after the record of said patent, except those of the defendants, who claim to have judgments on liens on said premises, which are subject and subordinate to the titles of the plaintiffs, who allege that said sale and assignment of said land warrant was wholly void and of no effect, because the said Orphans' Court never made any order or decree, or took any other proceedings authorizing the said guardian to sell, transfer or assign the interest of said minors in said land warrant; and without such order or decree of said Orphans' Court, the said guardian had no authority to sell, transfer or

assign the interests of said minor children; and that Elizabeth Remsen, the widow and guardian, was entitled only to a dower interest therein in said land, which could not be sold or assigned before admeasurement; and the said Harriet A. Remsen was at this time a minor of only seventeen years of age, and was intermarried with one Jacob A. Heyer, and her conveyance was void without the signature of her husband; and that none of the plaintiffs, or their predecessors in interest (except said Elizabeth Remsen, the said widow and guardian, who afterwards intermarried with one Wetzel) at the time of the alleged assignment of said land warrant, knew of said sale, and that they remained in absolute ignorance thereof, or that that or any other land warrant in which they were in interest had ever been issued to them, or their father, or their guardian, or that their father ever became entitled to any such land warrant until August in the year 1891, when they first had any knowledge or information whatever of the facts set forth in this bill, when they acquired their information in the following manner:

"Letters had been before received by them from parties in the city of St. Paul, State of Minnesota, representing the defendants, or some of them, requesting the plaintiffs, or some them, to execute quit-claim deeds of certain interests which they were supposed to have, or to have had in lands in the State of Minnesota. The deeds so requested being for all their interests in lands anywhere within said State, and the said parties declining to describe the particular, land intended to be conveyed." And that when said letters were received the plaintiffs, except their said guardian, were totally ignorant of ever having had any interest in any lands in the State of Minnesota, and on receipt of said letters they consulted counsel, who caused an investigation to be made of the records of the Land Department of the United States at Washington; and in the course of such investigation the plaintiffs ascertained, in the month of August, 1891, substantially the facts alleged in the bill; and thereafter employed counsel both in Philadelphia and St. Paul to investigate the title to the lands in dispute, and give opinions thereupon; and said investigation and the preparation of information on which to base this

suit was diligently prosecuted, and suit commenced, as soon as was possible under the circumstances of this case, could be done.

The bill alleges that defendants acquired their title and rights in the land in dispute with full notice and knowledge of all the recitals in said patent, and all the terms thereof; and that the defendants, and all persons claiming by, through or under said patent, are trustees of the said lands for the benefit of the plaintiffs, the value of which said lands exceeds twenty-five thousand dollars.

The bill prays for an accounting and a decree of conveyance, and other relief.

The answer denies that Elizabeth Remsen was only entitled to a dower right under said land warrant, or that the assignment was void, or that the Orphans' Court ever made any decree authorizing the sale and assignment of the same, or that the plaintiffs and their predecessors in interest were ignorant of the said assignment, or ignorant that a land warrant had ever been issued, or ignorant that George W. Remsen was ever entitled to the same.

And the answer alleges that the land warrant in question was issued, as set forth by plaintiffs in their bill, but aver that the same was personal property, and salable and assignable as personal property, and was not of the value of over one hundred dollars.

The answer admits the appointment of Elizabeth Remsen, as set forth in the bill, as the guardian of the minor heirs of Geo. W. Remsen, deceased, by the Philadelphia Court, as the proper Orphans' Court having jurisdiction of the subject matter and parties; and thereafter, as set forth in the bill, made the assignment thereof to Taylor; and that in doing this the guardian had full authority, as it was unnecessary to procure a decree therefor, or any order authorizing the sale of the land warrant; and that the Orphans' Court, by appointing her guardian, duly authorized her to sell, assign and transfer said land warrant, which she subsequently did in good faith, and for a consideration equal to the full value of such land warrant, paid by said Taylor to said widow and children of George W. Remsen, deceased, and thereupon said Taylor became the owner thereof by purchase, as aforesaid.

The answer alleges that the plaintiffs, as the widow and minor heirs of said George W. Remsen, deceased, have at all times known he was a soldier in the Mexican War, and entitled to a land warrant, and knew of its issuance to them by the Government, and from then until its assignment had actual possession of it.

The answer alleges that the defendants have no knowledge or information as to the manner and form in which plaintiffs became acquainted with their pretended rights, as stated in the bill, and hence deny the same.

The answer further alleges that Taylor, after the assignment to him of said land warrant under the written instrument. set forth in the bill, located the same upon the lands in dispute, and thereafter obtained the patent, as set forth in the bill, and recorded it in the county, the situs of the lands in dispute, and thereafter made divers conveyances thereof to the defendants, who purchased the same or advanced money thereon, or became entitled to a lien thereon, in good faith, without any knowledge or notice of any claim thereto by the widow and minor heirs of George W. Remsen, deceased.

The answer admits and alleges that, by various and sundry *mesne* conveyances, the land in dispute is now held and owned by the various persons set forth in the bill, but avers that at the time Taylor entered thereon it was not worth over one dollar and twenty-five cents per acre; and is now worth upwards of over $1,000,000, over and above improvements, and is owned by several hundreds of innocent purchasers, and has been absorbed by and become part of the city of St. Paul, and has for many years lain within its corporate limits, and has been platted into additions and subdivided into blocks and lots, is covered with many houses, and occupied by many actual residents, with improvements in excess of two millions of dollars thereon. And that the defendants and their grantors have been in possession of said land under their titles, and notoriously have exercised actual ownership over the same, and have paid the taxes and assessments thereon for nearly forty years last passed, to the amount of many thousand dollars, all with the knowledge of plaintiffs, and who made no claim or demand whatsoever of any right to said property at any time before filing their complaint.

The answer further alleges that the defendants and their grantors have been in open, notorious and continuous advance possession of said land for more than twenty years before the commencement of this action, and that plaintiffs and their predecessors or grantors were not seized or possessed of said land within fifteen years before the commencement of this action.

And that if defendants hold said land in trust for plaintiffs, as alleges in the bill, more than six years have elapsed since said cause of action accrued, and before the commencement of same, and is barred by the statutes of the State of Minnesota, being the seventh subdivision of section 6 of Title II, chapter 66, of the Statutes of Minnesota. And that plaintiffs and their predecessors had discovered and well knew all the facts set out in the bill more than six years prior to the commencement of this action; and those who were infants when the assignment and patent were made to Taylor, as well as their grandchildren, discovered and well knew all of said facts set out in the bill upon obtaining their majority, and many years more than six years before the commencement of this action. And that plaintiffs with such knowledge, acquiesced in the title of the defendants, and thereby became guilty of such laches as to bar recovery; and that plaintiffs ratified and confirmed the title of defendants; and therefore defendants pray to be discharged, and they have judgment for costs and disbursements.

The plaintiffs, to the answer of defendants, filed a general replication (see record, page 33), and thereupon proofs were had before an examiner, and upon argument upon bill, answer and proofs, the Circuit Court did enter a decree dismissing plaintiffs' bill. (See record, pages 217—220.)

And thereupon the plaintiffs did appeal to the United States Circuit Court of Appeals, of the Eighth Circuit; and by decree, dated December 10, 1894, the said Court did affirm the decree of said United States Circuit Court. (See record, page 232.)

And thereupon appellants did, on the 16th day of November, A. D. 1895, present their petition for an allowance of appeal from said decree of affirmance to this Honorable Court, which was duly allowed by said United States Circuit Court of Appeals. (See record, pages 232—233.)

And appellants did thereupon, on the 18th day of December, A. D. 1895, assign and file of record (see page 235) in said Circuit Court of Appeals the following:

II.

ASSIGNMENT OF ERRORS.

1. The said Court erred in not ruling and adjudging and decreeing that the sale of the land warrant by the widow and heirs of George W. Remsen was absolutely null and void, as alleged in the bill of complaint.

2. The said Court erred in not adjudging and decreeing that the sale of said land warrant was at least absolutely null and void as to the children of said George W. Remsen, who were minors at the date of sale.

3. The Court erred in not adjudging and decreeing that the sale and assignment of said land warrant was at least absolutely null and void as to the minor children of said George W. Remsen, for and on behalf of whom his widow executed the said assignment.

4. The Court erred in not adjudging and decreeing that said minor children, referred to in the last assignment, were under no obligation to disaffirm said sale and assignment after becoming of age.

5. The Court erred in not adjudging and decreeing that the sale and assignment of said land warrant was a conveyance of real estate.

6. The Court erred in not adjudging and decreeing that the vendee of said land warrant, as well as the purchasers under him, including the defendants in this case, were trustees of the legal title to said lands, or some part of them, or interest therein, and bound in equity to convey to the plaintiffs, or part of them, as prayed and alleged in the bill of complaint.

7. The Court erred in not adjudging and decreeing that the plaintiffs, or some of them, were the equitable owners of the real estate described in the bill, or some part thereof or interest therein.

8. The Court erred in not adjudging and decreeing that the defendants in this case were purchasers, with full notice of all the equities of the complainants, and each of them.

9. The Court erred in adjudging and decreeing that the complainants, or any part of them, were guilty of such delay or laches as to bar their rights to recover the premises described in the bill in this suit.

10. The Court erred in adjudging and decreeing that the bill of complaint in this suit be dismissed.

11. The Court erred in adjudging and decreeing that the decree entered herein, in the Circuit Court of the United States, in and for the District of Minnesota, Third Division, be affirmed.

III.

BRIEF OF ARGUMENT.

The first, second and third assignments of error resolve themselves into this proposition: That, assuming the interest of the widow of the deceased soldier in a Mexican bounty land warrant is more than a dower right, and obtains to a seizin in fee as a joint tenant to and with the minor children as heirs-at-law of said deceased soldier, yet no sale of assignment thereof can be legally made by said widow as the guardian of said minors, except so far as her own individual interest (whatever that may be) therein is concerned, but in pursuance of the 9th section of the Act of Congress (9 U. S. at Large, 125), approved the 11th day of February, A. D. 1847.

The defendants, however, controvert this proposition, and allege in their answer that, "at the time of the sale, transfer and assignment (of the land warrant in question) it was not necessary to procure from the Orphans' Court (appointing the guardian in question) any order or decree authorizing the sale of said land warrant: Nevertheless, the said Orphans' Court of the city and county of Philadelphia, did, by the appointment of the said Elizabeth Remsen (the guardian in question) aforesaid, duly authorize her to sell, assign and transfer said land warrant."

This plea, in confession and avoidance of the defendants, must fall when the provisions of the Act of Congress referred to are examined. This act contemplated more than the appointment of the guardian to carry with it the effect ascribed to it by defendants, for this act expressly provides that the legally

constituted guardian shall have power to sell and dispose of the interests of the minors therein, "upon being duly authorized, . . . and then only for the benefit of those interested."

The learned Courts below have never controverted this proposition, and it is respectfully submitted that these assignments of errors ought to be sustained.

The fifth, sixth and seventh assignments of errors waive the sequent, logical conclusion: That if the interests of the minor heirs of the deceased soldier in the land warrant in question were never legally assigned, transferred or sold, and the assignee of whatever rights therein were vested in the widow, located the lands in dispute under this land warrant, and subsequently surrendered the same to the Government, and took in lieu thereof a patent from the Government for the land in dispute, then he became by his own act a tenant in common with the minor heirs, and a trustee for them as to their several interests therein in the land in dispute, located under their land warrant.

And the soundness of this proposition is not dependent upon the assumption that the land warrant in question is or is not realty. It follows, by analogy, that rule of equity which impresses a trust upon property, where the title is taken in one name, and the purchase-mony paid by another, in favor of the latter. When the assignee of the widow got possession of the land warrant in question, he got property, whether real or personal, in which the minor heirs were parties in interest as well as himself, and he became their trustee and tenant in common. When he traded or exchanged this property for the land in dispute the relation and interests did not change—only the subject matter of the property underwent a change.

When the widow of the deceased soldier got from the Government this bounty land warrant for herself and his minor heirs it was a certificate of warranty for one hundred and sixty acres of public land; and under the provisions of the said Act of Congress, approved the 11th day of February, A. D. 1847, it amounted to an absolute donation by the Government of not, indeed, any specific land, but any quarter section of any public land, subject to private entry in one body and in conformity to the legal subdivisions of the public land surveys.

This Court has uniformly so treated these character of land grants by the Government.

Rutherford v. Greene's heirs, 2 Wheat, 196.
Freemont v. United States, 17 How., 559.
United States v. Reading, 18 How., 6.
United States v. Larkin, 18 How., 557.

These grants vest a present title to one hundred and sixty acres of public land, subject to private entry, but a location thereunder, however, is necessary to give precision to them and attach them to any particular tract. The grant then becomes certain, and by relation has the same effect upon the selected parcels of land as if the grant itself had specifically described the land located or surveyed thereunder.

Leavenworth Railroad v. United States, 92 U. S., 741.
Hornsbey v. United States, 10 Wall, 225.
Schullenberg v. Harriman, 21 Wall., 44.
Hall v. Russell, 101 U. S., 509.
Railroad v. United States, 103 U. S., 429.
Van Wyck v. Knevals, 106 U. S., 360.
Wright v. Roseberry, 121 U. S., 488.
St. Paul and P. Railroad v. N. P. Railroad, 139 U. S., 1.
Desert Salt Co. v. Tarply, 142 U. S., 241.

The decisions of this Court upon the military, as well as other land grants of the Government, must govern all titles to public land before the issuance by the Government of a patent, and they uniformly give to such grants the dignity and effect of grants in præsenti, with all the incidents of vested rights in real estate. (Article III., Sec. 290, Equity Rules.)

Robinson v. Campbell, 3 Wheat, 222.
United States v. Howland, 4 Wheat, 108.
1 Curt. Com., Sec. 27—29.
Vattier v. Hinde, 7 Pet., 252.
Wilcot v. McConnel, 13 Pet., 498.
Irvine v. Marshall, 20 How., 558.
Leavenworth Railroad v. United States, 92 U. S., 471.

But whether the land warrant in question was realty or not, Taylor, the assignee of the widow, in pursuance of the interest

which he acquired by the assignment by the widow of her interest therein, and the interest of Harriet A. Remsen, one of the minor children of said deceased soldier, which it purported to convey (although the testimony shows that she was at this time of but the age of seventeen years and intermarried with one Jacob Heyer, who did not join therein) to him, also, located upon the land in question and surrendered the same to the Government, and upon its cancellation received a patent therefor from the Government, reciting the grant by the Government to said Taylor, "assignee of said Elizabeth Remsen, in her own right and as guardian of the aforesaid minors" (see record, page 16), prior to the issuance of this patent, the assignment of the land warrant, and entry thereunder upon the land in dispute, conveyed to Taylor only an equitable interest in the land in question. Upon the issuance of the patent, however, Taylor became vested with the legal title thereto; but this, of course, did not bar the prior equities of the minor children,—as to them he was sill their trustee and co-tenant.

Massie v. Watts, 6 Cranch, 148.
Irvine v. Marshall, 20 How., 558.
Brush v. Ware, 15 Pet., 108.
Stark v. Starss, 6 Wall, 402—419.
Meader v. Norton, 11 Wall, 442—458.
Widdicombe v. Childers, 124 U. S., 400, 405.
Felix v. Patrick, 145 U. S., 328.

It will not be seriously contended but that Taylor, the original assignee of the land warrant, was seized of the land in dispute under the patent obtained upon its cancellation in his own right, and as the trustee and tenant in common of the appellant's predecessors, the said minor heirs, and it is difficult to determine how he could transmit to the present defendants and their assignors in title a larger estate in the lands, the subject of this controversy, than he became seized of, unless the defendants can show that they or their assignors can tack on the estates of the minors by adversary possession.

But this is not attempted, and has been abandoned ever since the proofs conclusively showed that this land was not entered upon prior to the time Minnesota Transfer Railway Company,

one of the defendants, commendced to lay its tracks in the years 1881 and 1882 (see record, page 160), except a right-of-way to a railroad.

And clearly, if no period less than the statutory period of a State limitation will bar *cestui que trustent* of their remedy in equity, where suits are brought against their trustees or others claiming under them, with notice, on the principal that lapse of time is no bar to a subsisting trust in real estate or a cortenancy, and does not begin to run until knowledge of some overt act, or ouster, or refusal after demand to acknowledge the trust is brought home to them.

Oliver v. Piatt, 3 How., 333.
Clymer v. Dawkins, 3 How., 674.
Zellers v. Eckert, 4 How., 288.
Michod v. Giroud, 4 How., 502.
Taylor v. Benham, 5 How., 232.
Meader v. Norton, 11 Wall, 442.
Preston v. Preston, 95 U. S., 200.
Golden v. Kemmel, 99 U. S., 202.
Speidel v. Henrici, 120 U. S., 377.
Kirby v. L. S. & M. S. R. R., 120 U. S., 130.
Morrison v. Higgin, 136 U. S., 386.
Underwood v. Dungan, 139 U. S., 380.
Galliher v. Cadwell, 145 U. S., 368.

Ought not minor heirs of a deceased soldier of the Government—wards of the Chancellor—have at least as equitable provisions surround their property rights, which were donated to them by the Government in return for a father's life?

Clearly no duty devolved upon these minor heirs or their children and grandchildren, upon coming of age, to disaffirm the wrongful acts of their guardian, unless notice or knowledge thereof was brought home to them, for it is too clear to admit of any doubt that to create an estoppel against minors there must be some act or declaration or affirmance by them of their guardian's act, with full knowledge of all the facts; they are not bound by the negligence of their guardian.

Telegraph Company v. Davenport, 97 U. S., 373.

And for this reason the fourth assignment of error ought to be sustained.

If neither by acquiescence nor affirmance of appellants, nor the extension of defendant's estate by adversary possession, has the interest and title of appellants in the land in dispute been changed from its original condition, with Taylor as their trustee and tenant in common, it is difficult to conceive why the fifth, sixth and seventh assignments of error ought not to be sustained, as well as the eighth assignment of error; for if solemn recitals in the chain of defendant's pretended titles to the land in dispute did not affect them, with full notice of all the equities of the appellants here asserted, it is impossible to see how the wrongful acts of an executor, administrator, guardian, committee or trustee or other representative can ever be circumvented. This Court has uniformly held that wherever, upon the face of title papers, the purchaser has full means of acquiring complete knowledge of the title from the references therein made, he will be deemed to have notice thereof.

Brush v. Ware, 15 Pet., 111.
Oliver v. Piatt, 3 How., 333.
Cowell v. Spring Co., 100 U. S., 58.
Insurance Company v. Eldridge, 102 U. S., 547.
Sanford v. Sanford, 139 U. S., 642.

The remaining assignments of error involve the alleged errors of the Courts below in dismissing the plaintiff's bill, on the ground that the plaintiffs were guilty of such laches as to bar their recovery to the land in dispute.

In the opinion of the learned Judge of the Circuit Court of Appeals (27 United States App., 594), while admitting that plaintiffs' rights are not barred under any of the statutes of limitations of the State Court, the situs of land, yet applies the doctrine, in this case in bar of plaintiffs' rights, on the ground of the change in the condition of the property, the subject-matter of the suit, and the relations of the parties to the controversy.

This, it is respectfully submitted, in the absence of some direct proof of plaintiffs' negligence, is setting up an equitable estoppel, which the sovereign laws of the Government have

never enacted; and in the absence of such legislation it is not the province of the Court to so legislate.

The pertinent inquiry arises at this point: How have defendants been injured in the increase of the valuation of the property in question? If it has appreciated in value, the interest of the widow of the deceased soldier, the only interest of which they were ever seized, has the advantage of this betterment, in common with the interests of the (minor heirs, the appellants' predecessors in interest), their co-tenants.

This is the only change in the condition of the property since the defendants or their directors were seized thereof, and in this change they share beneficially therein with the appellants.

There has been no change in the relations of the parties to the controversy, except in the augmentation of their numbers; but this, like the change in the value of the property, is no disadvantage to the parties defendants, and were it, they took with full notice of the equities herein asserted of the appellants.

The equitable doctrine which the Court would impress is derivable from entirely different causes than these and is enforceable against those seeking to recover against innocent purchasers, without notice.

This Honorable Court has enforced this doctrine only in cases where the original transactions have become so obscured by lapse of time, loss of evidence and death of parties as to render it difficult, if not impossible, to do justice.

Brown v. County of Buena Vista, 95 U. S., 157, 160.

But the learned Court below says, in view of the lapse of time, the plaintiffs ought not only to aver, but offer proofs sufficient to justify the delay.

If complainants' averments in their bill were sufficient to carry them successfully over a demurrer, then surely the proofs sustain these allegations.

The averments that none of the complainants or their predecessors in interest, except the widow and guardian, at the time of the alleged assignment and sale of the land warrant, knew of said sale, and that they remained in absolute ignorance thereof, or that that or any other land warrant in which they were ever interested had ever been issued to them or their

father or guardian, or that their father ever became entitled to any such land warrant until in the month of August, 1891, is the uniform testimony of all of said complainants.

Neither the widow, nor Harriet A. Remsen, the elder child, who, at the time of the assignment, was only seventeen years of age, and intermarried with Jacob Heyer, could read or write. That neither signed their names to the assignment is shown by the expert testimony of Edwin B. Hay. (Page 147 of the record.) Hariet A. Remsen testified she was not present at the execution of the assignment, nor never knew of it, (Page 98).

How the complainants learned of the facts upon which this claim is predicated is averred in said bill that letters had been received by them from the parties in the city of St. Paul, Minnesota, representing defendants or some of them, requesting plaintiffs or some of them to execute quit-claim deeds of certain interests which they were supposed to have in lands in the State of Minnesota, the deeds so requested being for their interests in land within said State, and the parties writing, declining to describe the particular land intended to be conveyed. And that when said letters were received, the plaintiffs, except said guardian, were totally ignorant of ever having had any interest in land in the State of Minnesota; and on receipt of said letters they consulted counsel, who caused an investigation to be made of the records of the Land Department at Washington; and in the course of that investigation complainants obtained, in the month of August, 1891, the facts alleged in the bill as to the sale and assignment of the land warrant.

That the defendants, or some of them, had become restive of the uncertainty of their title under the patent issued in cancellation of this land warrant, and had determined to purchase the outstanding equities of the complainants, is shown by the search made to locate them by the St. Paul syndicate, of whom George L. Hendrickson, Esq., was one. (See record, pages 194—196.) While it is true Mr. Hendrickson says, in the month of December, 1889, he ascertained by questioning the former guardian, "that she knew of no land in the West, excepting the Mexican warrant of George W. Remsen," which she had sold and assigned, "and that he had to tell them that there

was some right in the heirs to bar a power of attorney," and he "simply said there was a defect in the title," but "didn't specify what"; but nothing was said about there being any defect in the assignment of the land warrant.

This testimony clearly shows that in December, 1889, Hendrickson came from St. Paul to Philadelphia to negotiate for a power of attorney, which was to be used to cure some undefined and untold defect in the title to land obtained under this warrant, and as the guardian who had attempted to assign and sell the interests of the minors therein, "did not talk very much to the point," it is clearly seen why William C. Mayne was met in Philadelphia at this time. The "stipulations as to certain facts" known to said Mayne at this time, appear on page 197 of the record, and for what purpose he was sought by this gentleman from St. Paul to procure a power of attorney from the complainants.

Thus, as the facts appear, by the defendant's own conduct, the ignorance of complainants was dissipated, all the technical presumptions attempted by defendants to be raised against them must disappear.

Lincoln v. French, 105 U. S., 614.
Fresh v. Gilson, 16 Pet., 327.
Prevost v. Gratz, 6 Wheat., 481.

But notwithstanding that the proofs submitted in this case fully sustains the averments in the bill justifying the delay in bringing this suit, against parties with full notice of record of the equities herein sought to be recovered: Notwithstanding that notice of their equities were brought to the knowledge of complainants by the defendants themselves or their representatives. And notwithstanding, as soon as notice is thus brought home to them, complainants bring this suit, and at a time when defendants had not been in possession of said land for a period of more than ten years, during all of which time the possession of defendants was not adversary, but in harmony with the record title, as tenants in common with complainants: Yet the Court below invoked against them the decisions in

Badger v. Badger, 2 Wall., 87, 95.
Godden v. Kimmell, 99 U. S., 201.
Galliher v. Cowell, 145 U. S. 368.
Felix v. Patrick 145 U. S., 317.

Naddo v. Bardon, 4 U. S., Apps., 642.
Lemoine v. Dunkin Co., 10 U. S., Apps., 227.
Railroad v. Sage, 4 U. S., Apps. 160.
Ashhurst App., 60 Penn. St., 290.

It is respectfully submitted, that in none of the above decisions, was the doctrines therein contained invoked in favor of parties with notice nor where the suit was brought within the statutory period of the State; nor where the delay in bringing suit had occasioned defendants no loss of evidence, and the excuse justifying the laches was caused by want of notice in the moving party.

The unanswered enquiry in these proceedings is: What duty devolved on plaintiffs to bring suit before notice was brought home to them by defendants in their demand for a power of attorney?

The Court below say they were presumed to know the law and to have known they were entitled to a bounty land warrant, or their father was so etitled.

Linked to this most unreasonable presumption is the assumption, that with no further notice, acknowledged, it was their duty to assume that a right available in their father's favor or in their favor, must have been cancelled, by the donation of that right, and it was their duty to have examined the archives of the Government and ascertained affirmatively the exercise of such right on attaining their majority, or they are guilty of contributory negligence.

And the Court below is unable to distinguish between the duty thus cast upon complainants, and the notice cast upon defendants in the recitals of their title spread upon the records of the county, the situs of the land in dispute.

If this be true, it challenges the doctrine of this Honorable Court, expressed in *Brush* v. *Ware*, 15 Peter, 108.

And if presumptions of such weird and fantastic character are to control the facts, then must fall the principals enunciated in *Lincoln* v. *French*, 105 U. S., 614; *Fresh* v. *Gilson*, 16 Pet., 327, and *Prevost* v. *Gratz*, 6 Wheat, 481.

All of which is respectfully submitted,

WILLLIAM C. MAYNE,
Of Counsel for Appellants.

JAN 17 1898
JAMES H. McKENNEY
Clerk

No. 94.

Brief of Hunter for Appts.

Filed Jan. 17, 1898.

In the Supreme Court of the United States,

OCTOBER TERM, 1897.

No. 94.

ELIZABETH WETZEL ET AL., APPELLANTS,

VS.

THE MINNESOTA RAILWAY TRANSFER COMPANY ET AL.

BRIEF FOR APPELLANTS ON QUESTION OF JURISDICTION.

EDWARDS & BROUGHTON, PRINTERS AND BINDERS, RALEIGH

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 94.

ELIZABETH WETZEL ET AL., APPELLANTS,

vs.

THE MINNESOTA RAILWAY TRANSFER CO. ET AL.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR APPELLANTS ON QUESTION OF JURISDICTION.

This appeal is taken from the decree of the United States Circuit Court of Appeals for the Eighth Circuit under the provisions of the last clause of section 3 of the Appellate Court, Act of March 3d, 1891.

"In all cases not hereinbefore, in this section, made final, there shall be of right an appeal or writ of error, or review of the case by the Supreme Court of the United States, where the matter in controversy shall exceed one thousand dollars, besides costs."

The decision of the Circuit Court of Appeals is made final by the act in all cases in which the jurisdiction is dependent entirely upon diversity of citizenship, and in cases arising under the patent laws, revenue laws, criminal laws, and admiralty cases.

In all other cases the right of appeal to the Supreme Court is preserved.

Press Publishing Co. v. Monroe, 164 U. S., 105.

The right of appeal is, therefore, preserved in all cases where the Circuit Court has jurisdiction of the case, by reason of the

fact that it arises under the Constitution or laws of the United States (Act March 3d, 1875, 18 Stat., 470); and it is immaterial to such a case, or the right of appeal therein, that other questions, not of a Federal nature, may be involved, or that the final decision, from which the appeal is taken, may be based upon other grounds.

Osborn v. United States Bank, 9 Wheat., 738, 821.

In this respect there is a marked difference between the appellate jurisdiction of the Supreme Court in cases taken from the highest Courts of the States and those coming from the Federal Courts. In the former, to give the Supreme Court jurisdiction, it must appear that the decision from which the appeal is taken was based directly and solely upon a Federal question, right or privilege; in the latter it is not material upon what the decision was based, provided the inferior Federal Court originally had jurisdiction of the case as one arising under the Federal Constitution or laws..

That the case is one arising under the Federal Constitution or laws must appear from the record at the time the suit is begun; it must appear from the plaintiff's complaint or statement of claim.

Tennessee v. Union and Planters Bank, 152 U.S., 454, 458.

This suit was brought by the appellants as complainants in the Circuit Court of United States for the Third Division of the District of Minnesota, by bill in equity to establish their right to a certain tract of land situated in Ramsay County, Minnesota.

Their claim to title was based on the provisions of section 9, of the Act of Congress of February 11, 1847, 9 Stat., 123, 125, c. 8, under which George W. Remsen, a soldier of the Mexican war, became entitled to one hundred and sixty acres of land. Remsen, having died in service, the right inured to the benefit of his surviving wife and children, and a warrant was duly issued to Elizabeth Remsen, the widow, and five children, all minors.

The Act of February 11, 1847, provides that in the event of the issuance of the land warrant to the minor children of such deceased soldier, "the legally constituted guardian of such minor

children shall, in conjunction with such of the children, if any, as may be of full age, upon being duly authorized by the Orphans' or other Court having probate jurisdiction, have power to sell and dispose of such certificate or warrant for the benefit of those interested."

Elizabeth Remsen qualified as guardian of all the children except Harriet A. Remsen, and subsequently sold and assigned the warrant for a small sum of money, without any order of the Orphans' Court of Philadelphia County, to one Nathan C. D. Taylor, who located the same and received a patent therefor. This is the land in controversy. Harriet A. Remsen appears to have joined in the sale of the warrant.

The complainants are the widow, Elizabeth Wetzel (formerly Elizabeth Remsen), and the surviving children are their descendents.

The complainants cause of action, as thus set forth in their bill of complaint, is based directly upon the Act of Congress of February 11, 1847, and arises directly out of it.

The minor children of the deceased soldier became entitled to a certain quantity of land by virtue of said Act and by virtue of the issuance of the warrant thereunder, and they have been wrongfully deprived thereof by the attempted assignment of their interest in that warrant, without the order of the Orphans' Court, required by the Act.

The case thus turns directly upon the interpretation of the Act of February 11, 1847. The right of property in the complainants was created by that act, and the cause of action arises out of the non-compliance with the provisions of that Act.

Complainants contend that the assignment and sale of the land warrant by the widow, Elizabeth Remsen (Wetzel), could be effective only as an assignment of her own interest therein; and having been made without an order of the Orphans' Court, as required by the provisions of the Act, could not operate as an assignment of the interest of the minor children, and that, therefore, the assignee did not and could not take title to their interest.

The correct decision of the question thus presented by the complainants depends upon the construction of the Act of Congress of February 11, 1847. This is not a case where one is

merely demanding a thing conferred upon him by the Constitution or an act of Congress, where the creation of the right in the thing is not in issue; but the question raised is whether the assignment of the widow, without the authority of the Orphans' Court, could act as an assignment of the interest of the minor children, and could create any title in the assignee, so far as their interest is concerned, except as Trustee.

It is well settled that when the correct decision of the case, as presented by the complainant or plaintiff, depends upon the construction of an act of Congress, it is a case arising under the Federal laws, and as such is cognizable by the Circuit Courts, irrespective of citizenship.

Tennessee v. Davis, 100 U. S., 259, 264.

"Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim or protection, or defence of the party, in whole or in part, by whom it is asserted."

Story on the Constitution, sec. 1647.
Osborn v. Bank of U. S., 9 Wheat., 738.
Doolan v. Carr, 125 U. S., 618, 620.

This case of Doolan v. Carr (1887) was an action of ejectment in the Circuit Court of the United States for the District of California, in which the plaintiffs claimed title under a land patent of the United States. No citizenship of either party was alleged, and this was urged as a ground of reversal.

The Court, speaking through Mr. Justice Miller, said (page 620):

"It, however, appears very clearly that the controversy turns upon the validity of the patent from the United States, under which the plaintiff claims title, and which was denied by the defendants. The Circuit Court for the District of California, therefore, had jurisdiction of the case as one arising under the Constitution and laws of the United States, within the meaning of the Act of March 3, 1875."

In the present case the complainants, the minor children of the deceased soldier and their heirs, claim under a land warrant of the United States, and assert their title to the land in

controversy, under the provisions of the Act of Congress, by which their right to that land warrant was created. Not only was the right, upon which their claim is founded, created by an act of Congress, but their present right of action arises from the provisions of that act, and turns upon it correct interpretation.

There is no pretense that the jurisdiction of the Circuit Court in this case depended upon diversity of citizenship, for the bill of complaint does not allege a diversity of citizenship, such as would have been necessary to have given the Court jurisdiction upon that ground; and even if such diversity of citizenship had been alleged, it would have been immaterial; because, if the complaint showed a cause of action arising under the Constitution or Federal laws, the fact that the Circuit Court might also have assumed jurisdiction on the ground of diversity of citizenship, does not affect the finality of the decision of the Circuit Court of Appeals, since the Act of March 3, 1891, specifically provides that the decisions of Circuit Court of Appeals (except in patent, revenue, criminal and admiralty cases) are final only when "the jurisdiction is dependent entirely upon the opposite parties to the suit in controversy, being aliens and citizens of the United States, or citizens of different States."

In this case the citizenship of the parties was not stated, as jurisdiction was not urged upon that ground, and a statement of citizenship was, therefore, unnecessary.

Doolan v. Carr, 125 U. S., 618, 620.

The record shows that statutory amount is involved. The bill of complaint alleges that the value of the land in controversy exceeds the sum of twenty-five thousand dollars, and the answer of the defendants places a very much higher value upon it.

Respectfully submitted,

ERNEST HOWARD HUNTER,
Of Counsel for Appellants.

No. 94.
Brief of Hinsdale for Appellants
Filed Jan. 19, 1898.
Supreme Court U. S.
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JAN 19 1898
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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1897.

No. 94.

ELIZABETH WETZEL ET AL., APPELLANTS,

vs.

THE MINNESOTA RAILWAY TRANSFER CO. ET AL.,
RESPONDENTS.

BRIEF OF

JOHN W. HINSDALE,

OF COUNSEL FOR APPELLANTS.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1897.

No. 94.

ELIZABETH WETZEL ET AL., APPELLANTS,

vs.

THE MINNESOTA TRANSFER RAILWAY ET AL., RESPONDENTS.

BRIEF OF COUNSEL FOR APPELLANTS.

ABSTRACT OF THE BILL.

The bill filed by complainants on May 28, 1892, sets forth *inter alia:*

That the complainants are citizens of the States of Pennsylvania, New Jersey, and Maryland; and,

That the defendants are citizens, copartnerships, and corporations of—incorporated under, or doing business by virtue of—the laws of the State of Minnesota, and other citizens, copartnerships and corporations of a diversity of citizenship and States as set forth; and,

That complainants are the widow and heirs at law of one George W. Remsen, deceased, who became entitled to a certain land warrant, No. 28811, as therein set forth, for 160 acres of Government land, duly issued by the United States, on the 13th day of February, A. D. 1848, to Elizabeth Remsen, widow, Harriet A., Mary Ann, John Wesley, Elizabeth, and George W. A. Remsen, deceased, a soldier in the United States Infantry, killed in the Mexican War, which said land warrant was issued as aforesaid by virtue of the act of Congress, approved the 11th day of February, A. D. 1847, (a copy of which said land warrant is set forth in the bill, a certified copy of which appears on page 358 of the printed record); which said land warrant entitled them, pursuant to the ninth section of said act, to locate on any quarter section of Government land, subject to private entry, under the regulations and restrictions established by the Commissioners of the General Land Office; and,

That at the time of the issuance of said land warrant, and the assignment thereof, as set forth in said bill, the grantees therein were

the widow and minor children, and only heirs at law of said George W. Remsen, deceased, and all of said children under the age of fourteen, except the said Harriet A. Remsen, who was seventeen years of age; and,

That said widow was, on or about the sixth day of October, A. D. 1848, duly appointed the guardian of the persons and estates of said minor children, except the said Harriet A. Remsen, by the Orphans' Court of Philadelphia County, the court having jurisdiction of said minors and said guardian (a certified copy of which proceedings appears on pages 365, 366, of the printed record); and,

That on the eleventh day of October, A. D. 1848, at Philadelphia, in the State of Pennsylvania, the said widow, purporting to act for herself, and as guardian for said minor children, joined with the said Harriet A. Remsen, and together they attempted to assign said military land warrant by a written instrument (a certified copy of which appears on page 359 of the printed record), executed and delivered that day to one Nathan C. D. Taylor; and,

That said assignment was wholly void and of no effect, because said Orphans' Court never made any order or decree or took any other proceedings, authorizing said guardian to make said assignment; and,

That said widow was only entitled to a common law dower in said real estate, which could not be sold or assigned before admeasurement, and that said Harriet A. Remsen was a minor, and at the time of said assignment was intermarried with one Jacob Heyer, who did not join therein, and that both the conveyances of said widow and said Harriet A. Remsen were void, therefore, by the law of the said State of Pennsylvania; and that said Harriet A. Remsen did not know the nature of the instrument she signed, and was totally ignorant that she had any interest in the said warrant, or any lands, or that her father was, or ever had been entitled to said warrant, or said lands; and that she signed the instrument in such ignorance at the request of her mother, the said widow, who represented that the same was a receipt of a formal character; and that she never received any consideration therefor, and remained in ignorance of the matters stated in the bill until eight months before bringing suit; and,

That said Taylor, as the assignee aforesaid, located the same on the land in suit (a certified copy of the said location appears on pages 361–363 of the record), which said lands are now situate in the county of Ramsey, in the State of Minnesota; and,

That on the 20th day of March, A. D. 1850, the United States issued its patent to said Nathan C. D. Taylor as assignee as aforesaid (a certified copy of which appears on page 17 of the record), and which said natent was duly recorded in the office of the Register of Deeds of the said county of Ramsey, in Vol. "C" of Deeds, page 288; and,

That said Taylor afterward conveyed said lands and all the right, title and interest of said Taylor as to portions of said premises have passed to and are now claimed by some of said defendants as set

forth in said bill, who now claim to be the sole and absolute owners of portions of the said premises; and that all the said defendants claim title thereto by a chain of conveyances originating with said Taylor after the recording said patent in said office of the Register of Deeds; and,

That all the other defendants, as set forth in said bill, who claim to have judgments, mortgages or other liens on said land, claim the same under the first above referred to defendants, all of which said claims are subordinate to the title of the complainants; and that all of said defendants' titles and claims as aforesaid were acquired with full notice and knowledge of all the recitals in the said patent and the terms thereof; and,

That the complainant, Elizabeth Wetzel, is the said John Wesley Remsen's widow, and the said complainant, Harriet A. Vanzant, is the said Harriet A. Remsen; and,

That the said Mary Ann Remsen died on the twelfth day of June, A. D. 1882, leaving to survive her the complainants, Emma F. Hergesheimer and Maggie L. Beckman, her children and sole heirs at law, and that the complainant John Wesley Remsen, is the said minor John W. Remsen; and that the said Elizabeth W. Remsen died on the eleventh day of October, 1862, unmarried, and without issue, and her interest in said land, descended to the complainants herein, her sole heirs at law as provided by the laws of the State of Minnesota; that the said George W. A. Remsen died in 1878, leaving to survive him his widow, Mary J. Remsen, and his children, George W. Remsen, Clara B. Remsen and Mabel Remsen, as his sole heirs at law, the other complainants herein; and,

That none of the complainants or their predecessors in interest, except the said Elizabeth Wetzel, the widow of decedent, knew that said bounty land warrant was issued or that said widow as guardian had assigned the same as aforesaid or that the land in suit was located thereunder; that not until August, 1891, did they or any of them, except said widow, acquire any knowledge of the facts set forth in the bill; that their information was obtained by letters from parties in St. Paul, representing said defendants, or some of them, requesting them to execute quit claim deed for some interest which they were supposed to have in some lands somewhere in the State of Minnesota, the parties making said request declining to describe the particular land intended to be conveyed; and,

That in August, 1891, complainants employed the solicitors to this bill to investigate this title to said land and give opinions thereon; and that said investigation and preparation of information upon which to base this suit has been diligently prosecuted ever since, and suit begun as soon as it was possible under the circumstances for them to do so; and,

That complainants do ratify and confirm said location of said military land warrants, and aver that said defendants deriving any title under said patent are their trustees of said land, the value of which exceeds $25,000; and that defendants disaffirm said trust relation and claim to hold the same of their own right, freed from any equity

or right in the complainants or any of them, and claim said assignment to said Taylor was made in good faith, for a full and valuable consideration paid to said widow and said minor children which claim and defence is in no respect true; and that complainants deny that any consideration at any time was paid to said minor children, and that they have no knowledge, information or belief as to whether any consideration was paid to said widow and guardian; and

That defendants falsely pretend and claim that the chain of conveyance made to them was made in good faith and for full value, which complainants deny, and assert that each and every of the said conveyances were made with full notice of complainants' rights, and they have no knowledge, information or belief as to what considerations said defendants or their predecessors paid for said conveyances; and,

That said defendants falsely claim the improvements on said land to be of the value of $2,000,000, which complainants deny; but as to what said improvements are worth they have no knowledge, information or belief; and,

That defendants falsely claim that complainants and their ancestors and predecessors have for many years had knowledge that the land was owned by said Taylor and his grantees and persons claiming under him, and that said land was rapidly increasing in value, and that extensive improvements were being made thereon, all of which they deny and assert, that until a few months before suit commenced they had no such knowledge whatever, and further assert that said improvements were placed thereon with full notice and knowledge of complainants' rights, and that said judgments, mortgages and other liens thereon were acquired with full notice and knowledge of complainants' rights; and,

That said defendants claim, if they hold said premises in trust, more than six years have elapsed since the cause of action occurred before suit commenced, and it is therefore barred by the Statutes of Limitation of the State of Minnesota; which claim is without any foundation in fact, as no demand was ever made on said defendants, or any of them, to recognize said trust relation, or to account, or to convey, until about the date when suit was commenced; and that said trust relation was wholly unknown to them, and each of them, until within six months before suit commenced; and,

That defendants claim that complainants have acquiesced in the title of the defendants and their grantors, and have therefore been guilty of laches, which claim is false in every respect, and complainants assert that they or any of them have never in any manner acquiesced therein, or been guilty of any laches or delay whatever.

The prayer of the bill is for an accounting of the rents, issues and profits, and a conveyance of complainants' interest in said lands, and further equitable relief.

ABSTRACT OF THE ANSWER.

The answer admits:

That one George W. Remsen, in his lifetime, became entitled to

the land warrant in suit, and the issuance of the same to his widow and children; and that his widow was duly appointed by the Orphans' Court of Philadelphia County, a guardian of his minor children; and the assignment thereof, the location of the same, and the patent therefor to the lands in suit, and the various sundry and mesne conveyances thereof to the defendant as set forth in the bill.

The answer denies:

That said widow was entitled only to a dower interest in said lands, located under said land warrant,

And that the assignment thereof was void, and that the assignment thereof by Harriet A. Remsen was void; or that the said Orphans' Court never made any order or decree or took any other proceedings authorizing said guardian to sell, transfer or assign the interest of the said minors therein; or that by the laws of the State of Pennsylvania, and the act of Congress, the said guardian had no authority to sell, transfer or assign said land warrant; or that the said Harriet A. Remsen was ignorant of the contents of said assignment, when she signed the same believing it to be a receipt; or at that time she was a minor and *feme covert;* or that the complainants became acquainted with their pretended rights in the manner and form as set forth in the bill; or that they or their predecessors were ignorant of the said assignment, and the issuance of the said land warrant, or that said George W. Remsen was entitled to said land warrant.

The answer avers:

That said land warrant was personal property and salable and assignable as such, and was of the value of not more than one hundred dollars, and was a mere right to select lands; and, that the assignment thereof was duly made by said widow for herself and as guardian of said minor children and by said Harriet A. Remsen to said Taylor, as set forth in said bill; that said guardian was duly empowered to make said assignment and sale; and that under the laws of the State of Pennsylvania and of the United States, at the time of said assignment, it was not necessary to procure from said Orphans' Court or any other Court, any order or decree authorizing the sale of said land warrant; that nevertheless the said Orphans' Court of Philadelphia did, by the appointment of said Elizabeth Remsen as guardian, duly authorize her to sell, assign and transfer said land warrant, which said sale was made in good faith for full value, and was paid by said Taylor to said widow and children, and that thereupon said Taylor became the owner of said land warrant by purchase thereof; and, that said Harriet A. Remsen at all times knew the nature of said assignment, and received her share of the consideration thereof; and,

That the complainants have at all times known that the said George W. Remsen was a soldier in the Mexican War and entitled to a land warrant; and severally knew that the land warrant in question at the time when the same was issued was duly and properly issued to said widow and to them and the heirs of George W. Remsen, and from the date of its issuance to the date of its assignment the said widow and heirs had actual possession thereof; and,

That said Taylor, as the owner of the said land warrant, located the same upon the land in suit on the 31st day of October, 1849, and that the United States on the 20th day of March, 1850, duly issued a patent thereon to the said Taylor, conveying the same to him in fee simple, and said patent was recorded as set out in the bill; and that prior to the receipt of said patent the Land Department of the Government duly and properly allowed said Taylor to enter said lands, and duly accepted said land warrant in payment therefor; and,

That thereafter, on or about the 28th day of April, A. D. 1854, said Taylor conveyed said land to one Gilfillan, by a warranty deed for six hundred dollars, which was the value of said land, and said warranty deed was duly recorded; that thereafter, on or about the 28th day of April, 1854, the said Gilfillan conveyed said land to one McKenty, for one thousand dollars, by a warranty deed duly recorded; that thereafter, on the 22d day of May, A. D. 1854, said McKenty sold said land to one Pierse for two thousand dollars, being the full value of the said land, and a warranty deed therefor was duly recorded; that thereafter, on June 2d, A. D. 1855, said Pierse and wife conveyed said lands by warranty deed to one Pusey, for the sum of three thousand dollars, the full value thereof, and said deed was duly recorded; that thereafter, on May 4, A. D. 1860, the said Pusey conveyed said land to John W. Tatum, by warranty deed, for the price or sum of thirty-two hundred dollars, being the full value thereof, which deed was duly recorded; and,

That said purchasers acquired title to said lands without any knowledge or notice of any claims of said complainants or their predecessors in interest; and,

That thereafter said Tatum died, devising by will the said land to his children—Samuel C., John R., and Hannah Tatum—and said will was duly admitted to record in said Ramsey County, on June 11th, 1883; and,

That at the time said land was entered by said Taylor, as assignee as aforesaid, it was not worth over $1.25 an acre, and is now worth over $1,000,000, exclusive of the improvements thereon, and is now owned by the defendants herein as *bona fide* purchasers thereof; and,

That said land has for many years been within the corporate limits of the city of St. Paul, and is platted into additions thereof and subdivided into blocks and lots, and has many dwellings, occupied by actual residents, and other improvements thereon to the value of over $2,000,000; and,

That said defendants and their grantors have been in possession thereof, under said titles, openly and notoriously, and exercised acts of ownership and paid the taxes and assessments thereon for nearly forty years to the amount of many thousand dollars; and that said land has been sold from year to year, notoriously in the possession of various persons with the knowledge of complainants, and their ancestors and predecessors, who for many years have had full knowledge that said land was owned by said Taylor and those claiming under him, as set forth in the bill, and they have known of its in-

creasing value, and its location within a great city, and that elevators, warehouses and railroads were erected thereon, without making any claim thereon or demand of any right therein until suit brought; and,

That defendants have become the *bona fide* owners and purchasers from said Tatum, through various persons, by warranty deeds, for full value, and in every instance without any knowledge or notice of any of the facts set forth by complainants, or either or any of them; and,

That the improvements thereon, as set forth in schedule "A," were made in good faith, without any such notice or knowledge; and,

That the mortgages as set forth in Schedule "B" were received in the same manner without any such knowledge; and,

That the defendants, their grantors and ancestors, have been in open, notorious and continuous adverse possession of said lands for more than twenty years before suit was brought, claiming under said titles, and complainants were not possessed of said land, or any part thereof, within fifteen years before suit brought; and,

That if defendants hold said land in trust, as alleged in the bill, more than six years have elapsed since said cause of action accrued and before commencement of this suit, and it is barred by the statutes of Minnesota; and that complainants and their ancestors knew the matters set forth in the bill more than six years before suit brought, and those who were infants at the time of said assignment and patent to said Taylor were acquainted with these facts upon attaining their majority more than six years before suit brought; and with such knowledge made no claim, demand, or gave any notice of the same, but acquiesced in the title of said defendant and those under whom they claim, and are therefore guilty of laches; and with full knowledge of all the facts set forth in the bill and answer a long time before suit brought, and after attaining their majority, did ratify and in all respects confirm said assignment of said land warrant to said Taylor, its deposit with and receipt by the United States and the issuance of said patent thereon to said Taylor in his own right and free of any trust, which and similar acts of ratification have since been frequently repeated, the last one being in and by the bill filed, to which defendants crave leave to refer.

THE FACTS.

A. Those being admitted by the answer are:

That George W. Remsen, deceased, in his lifetime became entitled to said land warrant in suit for enlistment and services in the United States Army, under the terms of an act of Congress, approved the 11th day of February, 1847, entitled "An act to raise for a limited time an additional military force, and for other purposes," and the various amendments thereto, or upon the same subject. That said Remsen having died prior to the issuance of said warrant, his widow and children became entitled to have the same issued to them, and thereafter the United States duly issued a land warrant numbered

28811 to the widow and children of said deceased soldier, viz., to Elizabeth Remsen, widow, to Harriet A. Remsen, Mary Ann Remsen, John Wesley Remsen, Elizabeth Remsen, and George W. A. Remsen, who were the children and heirs at law of George W. Remsen, deceased. That upon the issuance of said land warrant aforesaid, the said widow and children became the owners thereof;

That said Elizabeth Remsen, widow, was, on the 6th day of October, A. D. 1848, duly appointed guardian, by the Orphans' Court of Philadelphia County, of said minor children, as in the bill of complaint set forth; and that said court had jurisdiction of the subject-matter and of the parties; that the said assignment was made as set forth in the copy of the same in the bill; and,

That the various and sundry *mesne* conveyances to the various parties defendant were from the heirs of John W. Tatum, deceased, whose title thereto was predicated upon the patent of the land located under said bounty land warrant, which said patent was duly recorded on January 28, A. D. 1852, in the office of the Register of Deeds of Ramsey County, in the State of Minnesota, in book "C" of deeds, on page 288, as set forth in the said bill; and,

That prior to the receipt of said patent the Land Department duly and properly allowed the said Taylor to enter the said lands, and duly accepted the said land warrant of said Taylor in payment therefor.

B. Those admitted and agreed to by stipulations of counsel. (See pages 197–200 of the printed record.)

C. Those established by witnesses called on the part of complainants and defendants are:

That the complainants are the widow and heirs at law of George W. Remsen, deceased, as averred in the bill of complaint. (See exhibits 2 and 3 of complainants; and pages 35–39, 40, 42–44, 62, 73–77, and pages 55–60, 105, 194 of the record); and, that the said dececedent died on the 11th day of October, 1847, intestate (see exhibits 3 of complainants, and page 89 of the record); and, that the said widow intermarried with Paul Wetzel on June 28, 1864, who died on the____day of_____A. D._____ (See exhibits 1 and 3 of the complainants), and, that the said Harriet A. Remsen was born on the 2nd day of January, 1832, and was intermarried to Jacob Heyer on the 6th day of August, 1848, and divorced therefrom after the late rebellion, and thereupon married Mr. Vanzandt, who died four years ago. (See exhibit 3 and pages 37, 39–40, 50, 94, 96–97, 104, 128, 147–148 of the record); and, that the said Mary Ann Remsen was born on the 12th day of August, A. D. 1835; and intermarried with Daniel C. Becket on the 29th day of June, A. D. 1851, who died, leaving to survive him the said Mary Ann Becket, who died June 12, 1882, intestate, leaving to survive her the said Emma F., intermarried with J. U. Hergesgeimer on June 5, 1882, and the said "Laura" Mary L. S, intermarried with George W. Beckman on July 9, 1878. (See exhibit 3 of complainants, and pages 38, 61, 79–81, 105–107, 118, 125, 127–128), and,

That the said John Wesley Remsen was born on the 8th day of November, A. D. 1837, and intermarried with Martha B. Moore. (See exhibits 3 complainants, pages 37, 62, 88 of the record), and,

That the said Elizabeth Remsen was born on the 22nd day of February, A. D. 1840, and died, unmarried and without issue, on the 11th day of October, A. D. 1862 (see Ex. "3" complainants, page 38 of the record); and

That the said George W. A. Remsen was born on the 18th day of September, 1842, intermarried with Mary J. Derbishier, on the 19th day of June, A. D. 1864; and was last heard of alive on the 28th day of August, 1871; and left to survive him,

The said Mary J. Remsen, his widow, and the said George W. Remsen, who was born on the 2nd day of July, 1866, intermarried with Sallie Shaw, and the said Clara B. Remsen, who was born on the ---- day of ------, and the said Mabel Remsen, who was born on the 28th day of May, 1871 (see Ex. "3" complainants; and pages 37, 60-61, 88, 105-106, 76, 77, 127, 128, 134, 147) and,

That the said Elizabeth Wetzel made application to the government as the widow of the said George W. Remsen, through her counsel, for a pension and pay due him, and that she got the pension, and the counsel got the land warrants (pages 39, 39, 200, 201, 52, 53, 91, 92, 141,) and,

That on Oct. 6th, 1848, she was appointed guardian of said minor children without security (pages 91, 92, 100, 114, 115, 204, 205 of the record); and, that she made her mark as it appears on said assignment of said land warrant for herself and as guardian of said minors without any order or decree of said Orphan's Court; and that her daughter, the said Harriet A. Heyer, joined with her in making her mark to the same (pages 53, 55, 99, 99, 108, 112, 141 of the record); and,

That at the time of making her mark thereto, she could neither read nor write, nor was the contents of the instrument at that time or since ever read or made known to her or to her daughter, the said Harriet A., who could neither read nor write; and said Harriet was at that time intermarried with Jacob Heyer who did not join with her in the same (39, 40, 42, 43, 49-50, 94, 96 97, 99, 107-108, 110-114, 115, 146, 147 of the record); and,

That she received, at the time of making her mark, the sum of $107, less attorneys' fees and expenses; but that said Harriet A. Heyer and the other minor children did not receive any of said sum or any other money therefor (48, 49, 117 of the record); and,

That she never told the minor children or her grandchildren or any of the complainants about receiving the land warrant or her appointment as guardian of said minors, or her making her mark to the assignment; that the elder of her children knew that their father was a Mexican soldier and that she received a pension on account of his death in the Mexican War (40, 51–53, 90–92, 99–103, 78, 82, 82, 66–69, 114–117, 119, 123, 149, 150, of the record); and that on the 31st day of October, 1849, the said Nathan C. D. Taylor deposited the said land warrant in the Land Office at Still-

water, Minnesota, and did then and there elect to locate the same on the land in suit, in satisfaction of said land warrant as assignee of said Elizabeth Wetzel in her own right and as guardian of said minor children (202–203 of the record); and,

That on the 20th day of March, 1850. a patent was granted by the Government in pursuance of the satisfaction and cancellation of said land warrant for the land in question, reciting that the land was granted to said Taylor, as assignee of said Elizabeth Remsen, in her own right and as guardian of said minor heirs, and on the 28th day of January, A. D. 1852, recorded in Ramsey County, Minnesota, in book "C" of deeds, page 288—(28–29, 200 of the record); and that on the 28th day of April, A. D. 1854, one Gilfillan, a clerk then in the said land office at Stillwater, Minnesota, received a general warranty deed for said land from said Taylor, reciting a consideration for $600, which he (the said Gilfillan) took for one McKenty, to whom, by deed bearing even date, reciting a consideration of $1,000, he transferred it; that McKenty actually paid only $700; he, said Gilfillan, receiving a hundred dollars for the transaction. (Defendants' Exhibits Nos. "7 and 9"—153–155 of the record). And that the said McKenty a month after conveyed the land by general warranty deed to one Pierse, reciting a consideration of $2,000, and that said Pierse, a week thereafter, executed a title bond to said land to one Pusey, and by general warranty deed, dated June 2, 1855, said Pierse conveyed said land to said Pusey, reciting a consideration of $3,000, and that by general warranty deed, dated May 4, 1860, said Pusey conveyed said land to John W. Tatum, reciting a consideration of $3,200, but the real consideration was the cancellation of a debt of $3,000 which he, the said Pusey, owed the said Tatum;

That said Pusey had also by deed dated July 19, 1858, granted to the M. & P. R. R. Co., a right-of-way across said property, reciting a consideration of one dollar. (Defendants' Exhibits, 10, 2, 3, 4, 6—155, 141–144 of the record). And that at the time the said Pusey acquired the deed from said Pierse, he knew the source of title by an abstract thereof, which carried the title back to the patent, which showed that it was located upon a land warrant, for when lands are purchased by cash they have the word "Entered," marked thereon, and when entered upon a land warrant the word "Located," marked thereon;

And at the time of the conveyance of Pierse to him he lived in St. Paul continuously from 1854 to 1883; and that he did not examine the patent or never authorized any one else to examine it for him (250–255 of the record); and,

That the said John W. Tatum, to whom said Pusey conveyed died on the 15th day of June, 1866, testate, and his estate was duly probated in Ramsey county, Minnesota, and by final decree vested in John R. Tatum, Samuel C. Tatum and Hannah Tatum, share and share alike;

That the said John R. Tatum, at the time of the probate as aforesaid, resided in the State of Delaware, and by deed dated June 5, 1873, together with his wife, conveyed his undivided one-third in-

terest in the land in question to his brother, the said Samuel C. Tatum, reciting a consideration of $3,350;

That said Samuel C. Tatum died about five years ago (1887); and left to survive him, his widow, Eleanor Tatum, and his children, Mary C. Tatum, Amy T. Hilles and Elizabeth T. Long; and,

That the said Hannah Tatum conveyed her interest in the remaining land to the estate of the said Samuel C. Tatum for $35,500, payable $10,000 cash, and the balance, $5,000 semi-annually, the last instalment being paid a year or so before suit brought;

That the said John R. Tatum knew the land was located with a land warrant, but did not examine the patent, and that he negotiated the sale of Hannah Tatum's interest to the estate of Samuel C. Tatum; that he did not inform the parties of anything about the title; and that the said Hannah Tatum, by letters of attorney, dated April 29th, 1880, authorized the said Samuel C. Tatum to sell and convey her interest in the land in question; and,

The devisees of said Samuel C. Tatum, deceased have by mesne and sundry conveyances, conveyed by general warranty deeds the lands the subject of this suit, to the various defendants set forth in the bill, excepting the said conveyance of said Pusey to the Minnesota and Pacific Railroad of a right of way, as set forth in defendants' Exhibit No. "10;" (see defendants' Exhibits "1," "10," and "16," 138-141, 155, 193, 196 of the record); and,

That the defendants, or their predecessors in title, had no "actual notice" or knowledge of the rights and claims of the complainants, or their predecessors, at the time they purchased the said land and put improvements thereon, (143, 153, 160, 170, 170, 189, 196, 197 of the record); and,

That the land in question, located as aforesaid, is situated now in what is known as the Midway District, within the corporate limits of St. Paul, Minnesota, and is bounded on the north by Macalaster Park, on the east by Hamline, on the west by St. Anthony Park, and on the south by Merriam Park;

That the westerly sixty acres is known as the Transfer property, now occupied by the defendants, the Minnesota Transfer Company; that east of said Transfer property are blocks 1, 2, and 3, in what is known as the Lovering Factory, Warehouse Transfer property, now occupied also by the Deering and Sheppard warehouses, and all the other land embraced in the suit is known as "Midway Heights." (Defendants' Exhibits "12," "13," "14," "15," 177, 180, 183, 185 of the record); and,

That the Minnesota and Pacific Railroad was built across said land by virtue of the right of way of said Pusey (Defts. Ex. No. "6,") in 1862, it commenced to grade its road in 1858, and the tracks were laid in June, 1862, and was used as a railroad track up to 1876; it was subsequently sold to the defendants the Minnesota Transfer Railway Company (144, 156, of the record); and,

That the westerly sixty acres of the land in suit was entered upon by the defendants, the Minnesota Transfer Railway Company, as the grantees of the St. Paul, Minneapolis and Manitoba Railroad Company under their deed from Samuel C. and Hannah Tatum, dated

May 18, 1880 (defendant's exhibit, No 11) for said sixty acres; that said Transfer Company acquired title from said railroad company within a year after the said conveyance of said Samuel C. and Hannah Tatum; and that said Transfer Company commenced improvements thereon by laying its tracks in 1881 and 1882, and since then by putting up freight houses and stock-yards (159–160 of the record); and,

That the other one hundred acres of the land in question was platted in 1885, and at the time this suit was brought there were erected thereon the said Lovering factory, the Deering & Sheppard warehouses, and about sixty dwelling houses, which were constructed during the years 1886, 1887, 1888, 1889, 1890 and 1891 (158, 161, 188–188, 192, 196 of the record); and that all the land now occupied by the defendants, except the said right of way to the M. & P. R. R., was conveyed by said Tatum through his local agent, H. S. Fairchild, of St. Paul, Minnesota, to be platted and sold for them, and it was sold and conveyed to the defendants as set out in the bill, and in the answer and schedule, with the exception of twenty-four lots, the title of which still remain in the devisees of said Samuel C. Tatum; deceased (187, 196 of the record); and,

That the evidence as to the value and improvement of the said land was offered by defendants, subject to objection as to its relevancy, materiality and competency, and to be determined by this Court upon the hearing of the case (196 of the record), which is as follows:

That land warrants for 160 acres of land had a market value at the time of the assignment of the land warrant in question, and were rated at $112 to $125, and sold for five or ten dollars less in the Eastern cities (153–155 of the record); and,

That the land located in question was not worth over two or three dollars an acre in 1851; and from 1847 to 1850, not over one dollar and a half an acre; then fron 1850 to 1857 the said land increased in value, then remained dormant until 1869 or 1870, when it increased in value again until 1873, and then again in 1874 until 1887, when there was a great depression in the land market, which has continued ever since; and that the large increase in value of said land was in 1885, 1886 and 1887. (156, 157, 176, 179, 189, 196, of the record); and,

That the said land at the time of the commencement of this suit, exclusive of improvements was valued at from a million to a million one hundred and seventy-seven thousand five hundred dollars. (162, 172, 184, 188, of the record); and,

That the improvements upon said land at the time of the commencement of this suit were valued as follows:

On the Minnesota transfer	$231,000 00
On the Lovering factory warehouse transfer	5,930 83
And grading thereon	11,000 00
And additions thereon made by Winslow & Bros	500 00
And dwellings on the Midway Heights, exclusive of grading	100,000 00

That these values represent the first cost of these improvements; but all this evidence of the value of improvements upon the land in suit is offered only upon the merits of the case, and not in lieu of the assessment thereof, as provided for by the Claimant Act of the State of Minnesota, and if necessary, this question is to be tried *de novo* (160, 162–163, 168–169, 177, 184–185, 196 of the record); and that the additional facts are—

That George L. Hendrickson, a resident of Ramsey County, Minnesota, had knowledge of the land in suit, and heard about the claim of the heirs of said George W. Remsen, deceased, these complainants, and had a conversation with the said Elizabeth Wetzel and Mary J. Remsen at Philadelphia, about the second week of December, 1889, at the home of said Elizabeth Wetzel, whom he found to be the widow of said George W. Remsen, and had married again, and her name was Mrs. Wetzel.

That he stated to her that his errand was the obtaining of a power of attorney from her and the heirs of George W. Remsen to obtain title to lands in Minnesota.

That he ascertained by questioning her that she had sold a Mexican land warrant, and that Isaac Boleau, a Justice of the Peace, had attended to the business for her; that he, Hendrickson, told her there was a defect in the title, but didn't specify what; that the said Mary J. Remsen was present, but knew nothing about it; that Mrs. Wetzel talked a good deal, but not much to the point; that he did dot see any of the other heirs; that he met Mr. William C. Mayne at that time, but has no knowledge of his having consulted with Mrs. Wetzel and Mary J. Remsen at that time;

That he did not advise Mrs. Wetzel or Mrs. Remsen where the land was situated, or in what manner the title to the land was defective—(194, 195, 41–42, 45–48 63–71 of the record); and,

That the said Mary J. Remsen had no knowledge previous to Hendrickson's visit in December, 1891, that her mother-in-law, Mrs. Wetzel, had ever had or sold a land warrant, and did not know to whom or when she sold it, or in what capacity, or that the land was located thereon and patented to Nathan C. D. Taylor, or where the land was situated, or the other matters set out in the bill, until the meeting at Mr. Mayne's office in August, 1891—(63–71 of the record); and,

That the said Mary J. Remsen advised her children, the heirs of George W. A. Remsen, deceased, the said Clara B. Remsen, George W. Remsen, and Mabel Remsen, of Mr. Hendrickson's visit, as also Mrs. Beckman and Mrs. Hergesheimer, daughter and heirs of Mary Ann Remsen (Becket), deceased—(67, 68, 69, 77–79 of the record); and,

That she was married to George W. A. Remsen in 1864, and lived with him until 1871, when he went out to Iowa, and was last heard of alive in August, 1871; that during the seven years they lived together, they resided four years in the State of Delaware—(60–61, 67, 71–72, 77–79, of the record); and,

That the said Emma F. Hergesheimer lived in the State of New

Jersey at the time of Hendrickson's visit in December, 1889, and has lived there ever since; that she knew of his visit through her grandmother, Mrs. Wetzel, about six weeks after his visit; that she understood he came on about land out west that had belonged to her grandfather, George W. Remsen, deceased, which had been sold; that she had never known of any right or claim of her grandfather to land, but her grandmother said it was so; that it was a number of years back and was never spoken of before. She said it was a land warrant; that she only saw and talked with her sister, Mrs. Beckman, about it a month or two thereafter; that Mrs. Beckman had seen her grandmother, Mrs. Wetzel, and knew about as much of it as she did (120–122, 151–151 of the record); and,

That the said Clara B Remsen, George W. Remsen and Mabel Remsen knew that Mr. Hendrickson had made a visit to Philadelphia about some land in the west, but didn't know it was about a land warrant, or any of the other matters set up in the bill, until the meeting at Mr. Mayne's office, in August, 1891; the said Mabel Remsen being a minor at that time of said meeting; and said Mabel and Clara B. Remsen were not present at the meeting at Mr. Mayne's office in August, 1891 (77–79, 133–135, 148–149 of the record); and

That the said John Wesley Remsen never had any knowledge of the visit of said Hendrickson, or any of the matters set up in the bill, until the summer of 1891; that he had never been consulted and was not present at the meeting at Mr. Mayne's office in August, 1891; that he lived in the State of Maryland, and had resided there since he was twenty years of age (88, 92–94 of the record); and

That the said Harriet A. Van Zandt first heard of the visit of Hendrickson about two years ago; that she was living at that time in Lycoming County, Pennsylvania, and her daughter wrote her to come home, which she did, and they told her about the visit of Hendrickson and some claim about a land warrant (98, 101–103 of the record); and

That the said widow, Elizabeth Wetzel, broke up housekeeping when John Wesley Remsen was twelve years of age, and the brothers and sisters lived at different places thereafter, and did not often see each other (89–90, 96–103, 114–114 of the record); and

That the heirs, those of the complainants who were present at Mr. Mayne's office in August, 1891, first learned the matters set out in the bill of complainant, and all the complainants learned these matters at that meeting or subsequent thereto, and the said Mayne then and thereafter first acted for them as their attorney and agent in this matter; that said Mayne had communicated with all the heirs except the heirs of G. W. A. Remsen, deceased, the fact that a Mexican land warrant had been issued to the widow and heirs of George W. Remsen, deceased, for service in the Mexican war, and that there was a question as to the validity of the sale and assignment thereof, and a chance to claim the land located under said warrant, without disclosing to them the location of the land located under the said warrant; that the question of giving a power of attorney by the heirs to another party than himself for the purpose of bringing suit and

making settlements for their interest in said land was discussed a short time after the visit of said Hendrickson; but he had not apprised them of the nature or character of the invalidity of said sale or the other matters set up in said bill until and after the meeting at his office in August, 1891. (63, 69, 77–78, 89, 92–93, 98, 103, 119–121, 134, 135–137, 147, 150, 197, of the record) and, that this suit was brought as soon thereafter as it was possible to do so under the circumstances (198 of the record).

ASSIGNMENT OF ERROR.

1st. The said Court erred in not ruling and adjudging and decreeing that the sale of the land warrant by the widow and heirs of George W. Remsen, was absolutely null and void, as alleged in the bill of complaint.

2nd. The said Court erred in not adjudging and decreeing that the sale of said land warrant was at least absolutely null and void as to the children of said George W. Remsen, who were minors at the date of sale.

3d. The Court erred in not adjudging and decreeing that the sale and assignment of said land warrant was at least absolutely null and void as to the minor children of said George W. Remsen, for and on behalf of whom his widow executed the said assignment.

4th. The Court erred in not adjudging and decreeing that said minor children referred to in the last assignment were under no obligation to disaffirm said sale and assignment after becoming of age.

5th. The Court erred in not adjudging and decreeing that the sale and assignment of said land warrant was a conveyance of real estate.

6th. The Court erred in not adjudging and decreeing that the vendee of said land warrant as well as purchasers under him, including the defendants in this case, were trustees of the legal title to said lands or some part of them or interest therein and bound in equity to convey to the plaintiffs or part of them as prayed and alleged in the bill of c mplaint.

7th. The Court erred in not adjudging and decreeing that the plaintiffs or some of them were the equitable owners of the real estate described in the bill or some part thereof or interest therein.

8th. The Court erred in not adjudging and decreeing that the defendants in this cast were purchasers with full notice of all the equities of the complainants and each of them.

9th. The Court erred in adjudging and decreeing that the complainants or any of them were guilty of such delay or laches as to

bar their right to recover the premises described in the bill in this suit.

10th. The Court erred in adjudging and decreeing that the bill of complaint in this suit be dismissed.

11th. The Court erred in adjudging and decreeing that the decree entered herein in the Circuit Court of the United States in and for the District of Minnesota, third division, be affirmed.

POINTS.

The complainants maintain that—

1. George W. Remsen was entitled, under the Act of Congress, to a land warrant, which vested in him to his widow and children a present interest.

2. The assignment of the warrant by a guardian without authority of court was void as to the minors.

(*a*) Their right, under the warrant, was real and not personal property.

(*b*) Even if personal property, the Act of Congress prohibited such assignment.

3. The assignment of a land warrant by a *feme covert*, who is a minor, is void. If executed in ignorance, she is not called upon to disaffirm the act before she is informed of its true character.

4. The improvident issue of the patent in the absence of the complainant, did not divest them of their rights.

5. The issue of the patent raised no presumption contrary to the record and the truth, that the assignment had been authorized by the Orphans' Court.

6. By the assignment of the warrant and the subsequent issuance of the patent to Taylor a constructive trust was created through a constructive fraud.

7. The successive grantees of Taylor were fixed with constructive notice of all that the records in Washington and in Minnesota contained relative to the title of the land, including the guardian's want of authority.

8. The complainants have a right to adopt and ratify the location of the patent by their constructive trustee.

9. The statute of limitation of Minnesota do not apply to a suit in the Federal Court which is purely equitable.

10. The complainants' right is not barred by the statute of limitations.

11. The complainants' right to relief is not barred by laches or acquiescence.

ARGUMENT.

I.

GEORGE W. REMSEN WAS ENTITLED, UNDER THE ACT OF CONGRESS, TO A LAND WARRANT, WHICH VESTED IN HIM AND HIS WIDOW AND CHILDREN A PRESENT INTEREST.

The claim is founded on a land warrant issued under the Act of Congress of February 11, 1847, 9 Statutes at Large, p. 123, sec. 9 of this Act reads:

"That each non-commissioned officer, musician or private, enlisted or to be enlisted in the regular army, or regularly mustered in any volunteer company for a period of not less than twelve months, who has served during the present war with Mexico, and who shall receive an honorable discharge, or who shall have been killed, or died of wounds received or sickness incurred in the course of such service, or who shall have been discharged before the expiration of his term of service in consequence of wounds received or sickness incurred in the course of such service, shall be entitled to receive a certificate or warrant from the war department for the quantity of one hundred and sixty acres, and which may be located by the warrantee or his heirs-at-law at any land office of the United States, in one body, and in conformity to the legal sub-divisions of the public lands in such district then subject to private entry; and upon the return of such certificate or warrant, with evidence of the location thereof having been legally made to the general land office, a patent shall be issued therefor. That in the event of the death of any such non-commissioned officer, musician or private, during service, or after his discharge, and before the issuing of a certificate or warrant as aforesaid, the said certificate or warrant shall be issued in favor and inure to the benefit of his family or relatives, according to the following rules: First to the widow and to his children; second, his father; third, his mother. And in the event of his children being minors, then the legally constituted guardian of such minor children shall, in conjunction with such of the children, if any, as may be of full age, upon being duly authorized by the Orphans' or other court having probate jurisdiction, have power to sell and dispose of such certificate or warrant for the benefit of those interested."

By the foregoing statute George W. Remsen became entitled to a certain certificate or warrant for the quantity of 160 acres of public land which he or his heirs, being the widow and minor children, might locate under said warrant at any land office in the United States.

This grant by Congress amounted to an absolute donation by the government to the decedent and his heirs of one hundred and sixty acres of land, not indeed of any specific land, but any quarter sec-

tion of any public land in the United States subject to private entry, in one body and in conformity to the legal subdivisions of the public land surveys.

Rutherford *v.* Greene's Heirs, 2 Wheat., 196.
Fremont *v.* The United States, 17 Howard, 559.
U. S. *v.* Reading, 18 How., 6.

In *Rutherford* v. *Greene*, 2 Wheat., 196 at 205, Mr. Chief Justice Marshall said:

"It is clearly and unanimously the opinion of this Court that the Act of 1782 vested a title in General Greene to 25,000 acres of land, to be laid off within the bounds allotted to the officers and soldiers, and that the survey made in pursuance of that Act, and returned in March 1783, gave precision to that title, and attached it to the land surveyed."

In *Fremont* v. *The United States*, 17 How., 542, at page 558, Mr. Chief Justice Taney said:

"It is argued that the description is so vague and uncertain that nothing passed by the grant, and that he had no vested interest until the land was surveyed and the part intended to be granted severed by lines or known boundaries from the public domain. But this objection cannot be maintained. It is true that, if any other person within the limits where the quantity granted to Alvorado was to be located, had afterwards obtained a grant from the Government, by specific boundaries, before Alvarado had made his survey, the title of the latter grantee could not be impaired by any subsequent survey of Alvarado. As between the individual claimants from the Government the title of the party who had obtained a grant for the specific land would be the superior and better one. For by the general grant to Alvarado the Government did not bind itself to make no other grant within the territory described until after he had made his survey. But, as between him and the Government he had a vested interest in the quantity of land mentioned in the grant. The right to so much land, to be afterwards laid off by official authority, in the territory described, passed from the Government to him by the execution of the instrument granting it."

In *United States* v. *Reading*, 18 How., 1, it is decided that

"Although the title did not become definite until the grant was approved by the Departmental Assembly, yet an immediate interest passed by the grant from the Governor, whose duty it was (and not that of the grantee) to submit the case to the Departmental Assembly; and if they should reject it, then to lay the case before the Supreme Government of the Republic."

The warrant vested a present title in them, but a location thereunder was necessary to give it precision and attach it to any particular tract. The grant then becomes certain, and by relation has the

same effect upon the selected parcel of land as if the grant itself had specifically described the land located or surveyed thereunder.

Hornsby *v.* United States, 10 Wall, 225.
Schulenberg *v.* Harriman, 21 Wall, 44.
Leavenworth Railroad *v.* United States, 92 U. S., 741.
Railroad *v.* United States, 103 U. S., 429.
Van Wyck *v.* Knevals, 106 U. S., 360.
Wright *v.* Roseberry, 121 U. S., 488.
St. Paul and Pacific R. R. *v.* N. P. R. R., 139 U. S., 1.
Desert Salt Co. *v.* Tarply, 142 U. S., 241.

In *Hornsby* v. *U. S.*, 10 Wall., 225, 236, Mr. Justice Field said: "The greater number of the grants which have come before this Court for examination have belonged to the second-class. They have usually designated the land ceded by the general name of the valley or locality where situated, with a clause annexed that the concession was limited to the specific quantity mentioned, and that the magistrate of the viocinage, of whom possession was to be solicited, should cause the same to be surveyed, and that any surplus existing should be reserved for the use of the nation.

"When the first grant of this kind was presented for the consideration of this Court, in the Fremont case, 17 Howard, 542, 558, which was for ten leagues within a tract of much greater extent, it was objected that the grant was void for uncertainty of description, and that no interest passed to the grantee until the quantity was surveyed and severed by known boundaries from the public domain; but the Court held the objection untenable, and that, as between the government and the grantee, the latter had a vested interest in the quantity of land mentioned. "The right to so much land," said the Chief Justice, in delivering the opinion of the Court, "to be afterwards laid off by official authority in the territory described, passed from the Government to him by the execution of the instrument granting it." And in support of the principle asserted, the Court cited the case *Rutherford* v. *Greene's Heirs*, reported in 2d Wheaton, page 196.

* * * * * *

"The instrument purports on its face to transfer a full title to the property solicited. If valid when issued, it passed according to the decision in the Freemont case, to the grantees, a present and immediate interest in the quantity of land specified, to be subsequently laid off by official authority."

In *Schulenberg* v. *Harriman*, 21 Wallace, 44, it was decided:

"That the Act of June 3d, 1856, and the first section of the Act of May 5th, 1864, are grants *in præsenti* and passed the title to the odd sections designated to be afterwards located. When the route was fixed their location became certain, and the title, which was previously imperfect, acquired precision and became attached to the land."

In *Leavenworth* v. *U. S.*, 92 U. S., 733, construing an act of Congress which gave to the State of Iowa a certain quantity of land, not located, in aid of a certain railroad, Mr. Justice Davis said, (p. 741):

"It creates an immediate interest, and does not indicate a purpose to give in the future. 'There be and is hereby granted' are words of absolute donation, and import a grant *in præsenti*. This Court has held that they can have no other meaning; and the land department, on this interpretation of them, has uniformly administered every previous similar grant. *Railroad Co.* v. *Smith*, 9 Wall, 95; *Schulenberg* v. *Harriman*, 21 id, 60; 1 Lester, 513; 8 Opin. 257; 11 id. 47. They vest a present title in the State of Kansas, though a survey of the lands and a location of the road are necessary to give precision to it, and attach it to any particular tract. The grant then becomes certain and by relation has the same effect upon the selected parcels as if it had specifically described them. In other words, the grant was a float until the line of the road should be definitely fixed. But did Congress intend that it should reach these lands? Its general terms neither include nor exclude them. Every alternate section designated by odd numbers within certain defined limits, is granted; but only the public lands owned absolutely by the United States are subject to survey and division into sections, and to them alone this grant is applicable."

In *Railroad Co.* v. *Baldwin*,103 U. S., 429, Mr. Justice Field said

"The act is a present grant, except so far as its immediate operation is affected by the limitations mentioned. "There is hereby granted" are the words used, and they import an immediate transfer of interest, so that when the route is definitely fixed the title attaches from the date of the act to the sections, except such as are taken from its operation by the clauses mentioned."

In *Van Wyck* v. *Knevals*, 106 U. S., 360, it appeared that

"Subject to the exceptions therein mentioned, the act of July 23, 1866, c. 212, granted for the use and benefit of the St. Joseph and Denver City Railroad Co., the odd numbered sections of public land within a prescribed distance on each side of the proposed road. The Company duly filed in the office of the Secretary of the Interior a map showing the definite location of the line of the road. It was held that the grant was *in præsenti*, and attached to those sections as soon as the map was so filed; and that no valid adverse right or title to any part of them could be acquired by a subsequent settlement or entry."

In *Wright* v. *Roseberry*, 121 U. S., 488, it was decided that

"The grant of swamp and overflowed lands to the several States by act of September 28, 1850, is one *in præsenti*, passing title to the lands of the character therein described, from its date, and requiring only identification thereof to render such title perfect."

In *Railroad Co.* v. *Railroad Co.*, 139 U. S. 1, it was held that

"The grant of public land to the Northern Pacific Railroad Com-

pany in the act of July 2nd, 1864, 13 Stat. c. 217, p. 365, was a grant *in præsenti*, in the nature of a float until the route should be determined, and, after that, attaching to specific sections, capable of identification, except as to sections which were specifically reserved.

"The force of such grant was in no respect impaired or its construction effected by the provision in section four of that act that patents for the land should be issued, as sections of twenty-five miles of road should be completed; but the company was not at liberty to dispose of its land not patented, without the consent of Congress."

In *Deseret Salt Company* v. *Tarpey*, 142, U. S., 241, it was decided, "That the grant of public land to the Central Pacific Railroad Company by the acts of July 1, 1862, 12, Stat. 489, c. 120, and July 2, 1864, 13, Stat. 556, c. 216, was a grant *in præsenti*; and the legal title to the granted land, as distinguished from merely equitable or inchoate interests, passed when the identification of a granted section became so far complete as to authorize the grantee to take possession."

Under the act of Congress and under the language of the warrant we submit that the children and the widow took equal shares as tenants in common. It might be for our interest to establish that the widow took only a dower interest. But we see no ground for maintaining such a claim. Where a grant runs to several they take equally, as a general rule, and we see nothing to take this grant out of the general rule. Therefore, conceding that Taylor got a good title to the interest of Elizabeth, the widow, an undivided one-sixth, he became by the purchase a tenant in common with the minor children, he owning one-sixth of the warrant, and they, five-sixths.

II.

THE ASSIGNMENT OF THE WARRANT BY THE GUARDIAN WITHOUT AUTHORITY OF COURT WAS VOID AS TO THE MINORS.

The following is a copy of the assignment:

"For value received we, Elizabeth Remsen, widow, for myself and as guardian of the persons and estates of Mary Ann Remsen, John Wesley Remsen, Elizabeth Remsen, and George W. A. Remsen, minor children of George W. Remsen deceased, duly appointed by the Orphans' Court of the city and county of Philadelphia, and Harriet A. Remsen, do hereby sell and assign unto Nathan C. D. Taylor, all our right and title, and all the right and title of the said minor children, to the within certificate or warrant No. 28811, for one hundred and sixty acres.

"Witness our hands this eleventh day of October, 1848, at Philadelphia, in the State of Pennsylvania.

ELIZABETH (her X mark) REMSEN,
"For myself and as guardian of the minor children of George W. Remsen, deceased.
"HARRIET A. REMSEN.

"Attest:
"ISAAC BOILEAU.
"WM. F. SMALL.

"Acknowledged before me this eleventh day of October, 1848, at Philadelphia, in the State of Pennsyluania.

"ISAAC BOILEAU,
"Alderman and Justice of the Peace."

(*a*) *The right of the minors under the warrant was real, and not personal property.*

The federal law must be decisive of this question. By the Act of June 3, 1858, land warrants were made personal property, but prior to that time had been real estate. See opinion of Attorney General Black on this act, 1 Lester's Land Laws, 609, and *Brush* v. *Ware*, 15 Peters, where the Court holds, pages 107 and 112, that the military right *descended* to the heirs. These warrants had always been held by the War Department to be real estate. (1 Lester's Land Laws, p. 592; circular of July 20, 1875, par. 18; 2 Copp's Public Land Laws, 976.) Just as much as a railroad land grant before location.

They are incorporeal hereditaments descendible to heirs *Walker* v. *Daley*, 80 Wis., 227. Just as much real estate as a railroad land grant before location with the Supreme Court has often described as a float. In this case it was decided

"A private land claim having been finished by act of Congress, a person other than the true owners fraudulently procured the certificate of location to be issued to him, and assigned the same, and patents were issued to his assignees, granting the land to them and their legal representatives. In an action by the true owners against grantees of the patentees to have such grantees adjudged trustees for the plaintiffs, it is held a demurrer to the complaint:

(1) The plaintiffs have no adequate remedy at law to recover the land.

(2) The certificate of location being hereditaments, replevin or trover could not have been maintained therefor.

In this case Mr. Justice Winslow says, page 227:

"Whether replevin or trover could be maintained depends upon whether these land claims were chattels. It our opinion they were clearly hereditaments, descendable to heirs; fulfilling Blackstone's

definition of incorporeal hereditaments—"a right issuing out of a thing corporate, whether real or personal." 2. Bl. Commr., 20.

The purpose of the Act of June 3, 1858, was to change the character of land warrants. They had theretofore been treated as real estate. They were thereafter to be treated as personal property. This statute was not intended to thereby validate any prior informal or illegal transfers of an infant's property. Nor is it presumed that any disastrous or inconvenient consequences will flow from the application of different rules of transfer, of warrants issued before and after the year 1858.

The statute of March 22, 1852, sec. 2414, which declare all warrants for military bounty lands assignable, is cited, but it has no bearing upon the case at bar. The warrant in question was already assignable with the consent of the Court and it was perfectly competent for the commissioner of the general land office to prescribe forms and regulations for the assignment of any warrant that had not been assigned. But the purpose of the act was not to validate assignments which had been illegally or fraudulently made.

(b) *Even if the warrant was personal property, the Act of Congress prohibited its assignment by the guardian without express authority from the Orphan's Court.*

Congress attached by law the precedent condition of a probate decree to any sale of a minor's interest. It makes no difference what the nature of that interest is, whether real or personal. Congress might have provided that the warrant should not be assignable at all, or that it could be assigned only on certain conditions. If these conditions were not complied with the sale was void. Even if the warrant was personalty and within the ordinary power of a guardian to sell, that power had been expressly denied by the act of Congress which created the property; and it is perfectly competent for the legislative power to take away from a guardian the right to sell the personal estate, and this is not without precedent, for Congress to forbid alienation.

See Act of 1854, in regard to Sioux half-breed script.

But in the present case there was no such purpose. The only aim was to throw around the interests of an infant the protection of the Courts, and to require the guardian to obtain special authority before the infant's inchoate title to land should be sold. The statute provides that "the guardian (who had already been appointed), *upon*

being duly authorized by the Orphan's Court or other Court, having probate jurisdiction, should have power to sell," etc.

The counsel argues, that inasmuch as the guardian in Pennsylvania has, either by common law or by statute, the power to assign the personal property of his ward, without special authority of the Court, he is "duly authorized" to make the sale when he is appointed guardian. But Congress intends that the authority shall proceed from the Court, not from the law regulating the powers of guardians. The language of the statute is, "the legally constituted guardian * * * shall, *upon being* duly authorized *by the Orphans' Court or other Court* having probate jurisdiction, having power to sell and dispose of such certificate or warrants for the benefit of those interested." Tne purpose is obvious. The intervention of the Court in each particular case will tend to save the infant's estate from improvident or fraudulent bargains. *The authority must come from the Court*, by special order or decree.

The respondents' counsel have cited quite a number of cases in support of the proposition that statutory restrictions of assignability are not favored, and are strictly construed. These cases have no bearing upon the case at bar, for it is not pretended that the assignability of the Remsen land warrant was restricted or forbidden—it was simply regulated. And there is every reason to give a statute, which has for its purpose the protection of the wards of Court, the most liberal construction. It is not to be supposed that in a proper case the Court will withhold its consent, or that it will hesitate to permit the transfer when the sale should be made.

Of course it is not to be considered that Congress intended to legislate upon the status of minors in Pennsylvania particularly. But it did intend to circumscribe the power of guardians everywhere who undertook to deal with the land warrants of minors issued under the Act of February 11, 1847.

The following cases have been cited by the learned counsel for the respondent:

Mullen v. *Wine*, 26 Fed. Rep. 206, decides:

"The right of the children of a deceased soldier to locate and enter eighty acres of public land as an additional homestead under the Act of June 8, 1832, is personal property, and may be sold and assigned to a third party by their guardian."

But the Act of June, 8, 1832, does not require the guardian to obtain authority from the Orphans' Court before selling and disposing of the infant's property.

In *Randon* v. *Barton*, 4 Tex., 289, it appears that this case was a suit for breach of contract in failing to deliver certain land certificates. It decides that a contract for the transfer of land certificates need not be under seal, and that the rule respecting the measure of damages for breach of contract to transfer and deliver land certificates is that which applies to the breach of contract for the sale of chattels.

Graham v. *Henry*, 17 Tex., 167, simply decides that "in the absence of any restriction of the power of a grantee to sell, an incipient title or contingent interest which is susceptible of being ripened into title to lands may be assigned."

In *Cox* v. *Bray*, 28 Texas, 247, it is decided "that the sale of an unlocated Texas land certificate is not within the statute of frauds, and that, at any rate, payment of the purchase money and the subsequent location of the patent, taking possession of the land and improving the same will give the purchaser an equitable title."

In *Hearne* v. *Gellett*, 62 Texas, 25, it is decided that "a land certificate, though personal property when unlocated, loses its character as such after its location, and becomes a chattel real, title to which can no longer pass by parol."

Dodge v. *Litter*, 73, Texas 319, decides that "a purchaser of a land certificate filed in the land office and located upon land which it cannot hold is affected with notice of the facts apparent in the records of the land office in the particular file of which the certificate formed a part, and also of what ordinary investigation upon such facts would develop."

In *Rose* v. *Nevada & Grass Valley Wood & Lumber Co.*, 73, Cal. 385—388, it is decided that "The provisions of chapter 5 of the Revised Statutes of the United States, requiring a homestead claimant of public lands to be an occupant thereof, and restricting his right to alenate the same prior to the issuance of the patent, are not applicable to the additional homesteads allowed to honorably discharged soldiers and sailors, under section 2306 of the Revised Statutes. "In all cases where it has been the intention of Congress to prevent alienation by the beneficiary, such intention has been clearly expressed. Thus the act of Congress of 1854, under which the Sioux half-breed scrip was issued, provided expressly that no transfer or conveyance of the certificate should be valid. *Myers* v. *Croft*, 13 Wall., 291; *Mullen* v. *Wine*, 26 Fed. Rep., 206."

Knight v. *Leary*, 54 Wis, 460, decides that "one who has entered land under the homestead law may alienate it before the issues, in the absence of anything in the statute forbidding such patent alienation; and the patent, when issued to him, will vest the title in his previous grantee by deed of warranty."

In *Townsend* v. *Fenton*, 30 Minn., 528–530, it appears that "F. made a homestead entry under U. S. Rev. St., secs. 2290 and 2291, and made an agreement to convey the land as soon as he should

make final proof of his claim, upon a consideration to be paid at that time: *Held*, that the agreement is not void under the laws of the United States."

The Court says:

"It was an agreement to convey, not before, but after, the patent should issue, and upon a consideration to be received at the time of the conveyance. The plaintiff could not be entitled to a conveyance before the patent should have issued, nor then unless he performed or tendered performance on his part. It would be an abuse of terms to call this, of itself, an alienation. The agreement was, therefore, not void by reason of being prohibited by or contrary to the policy of the statute."

Threadgill v. *Pintard*, 12 How., 24, decides that "where a settler upon the public lands had a pre-emption right to them and sold them to a person who again sold them to a third party, the original vendor has a lien upon the land for the balance of the purchase money still due, and can enforce it by a bill in chancery, notwithstanding the vendee has taken out a patent in his own name under a subsequent pre-emption law."

French v. *Spencer*, 21 How., 228, decides that "land warrants issued under the Act of Congress of 1816, 3d Statute at Large, 256, which were delivered to the owners to be located by them, were therefore assignable after an entry was made in the Land Office."

Maxwell v. *Moore*, 22 How., 185, decides that "where an Act of Congress made void all sales or agreements by the grantee before patent issued under the Act of 1812, and another Act was passed in 1826 permitting the soldier under certain circumstances to surrender his patent and select other lands, but the second Act did not contain the avoiding clause contained in the first Act, an agreement to convey made after the first patent was surrendered, and before the second was issued, was valid and binding."

In *Doe* v. *Wilson*, 23 How., 458, a treaty made with the Pottawamie Indians in 1832, provided for reservations to individual Indians, which should be selected under the direction of the President, "after the land shall have been surveyed, and the boundaries shall correspond with the public surveys." Before this was done one of these reservees made a conveyance by a deed in fee-simple, with a clause of general warranty. In 1837 patents were issued for the reservations. It was held that "this deed vested the title of the reservee in the grantee and that the former was a tenant in common with the United States, and could sell his reserved interest."

Myers v. *Croft*, 13 Wall, 291, simply decides that "under the 12th section of the act of Congress of September, 1841, a pre-emptor who entered the land, and *who at the time is the owner in good faith*, and has done nothing inconsistent with the provisions of the law on the subject, may sell, even though he has not yet obtained a patent; that the disability extends only to the assignment of the pre-emption right."

Lamb v. *Davenport*, 18 Wall, 307, decides "that unless forbidden by some positive law, contracts made by *actual settlers* on the public lands concerning their *possessory* rights, and concerning the title to be acquired in future from the United States, are valid as between the parties to the contract, though there be at the time no act of Congress by which the title may be acquired."

Hussey v. *Smith*, 99 U. S., 20, decides "that under certain circumstances, the interest of a person who was in possession of a lot before it was entered, and mortgaged it to another person, but thereafter remained in possession, could under the act of March 2nd, 1867, be the subject of a sale or a mortgage."

Stringfellow v. *Cain*, 99 U. S., 610, decides that "where, under the act of March 2nd, 1897, the Mayor of Salt Lake City, on Nov. 4th, 1871, duly entered lands occupied as the site of the city, and received a patent therefor, in trust for the occupants thereof, and the Legislature of the territory prescribed rules for the execution of such trust, an occupant of a lot could sell and convey his possessory rights therein before the land was entered."

Webster v. *Luther*, 50 Minn., 77, 163 U. S. 331, decides "that a per, son entitled under the Revised Statutes, 2304, to enter a homestead, in case an entry is made for less than 160 acres, may, under section 2306, make an additional entry of the deficiency, which right is not personal, but is transferable and assignable."

None of these cases decide that when Congress has prescribed that a guardian must obtain the authority of the Court, which appointed him, to sell an infant's land warrant, he may disregard the injunction of the law, and alien the rights of his ward, according to his own irresponsible discretion.

III.

THE ASSIGNMENT OF A LAND WARRANT BY A FEME COVERT WHO IS A MINOR IS VOID. IF EXECUTED IN IGNORANCE SHE IS NOT CALLED UPON TO DISAFFIRM THE ACT BEFORE SHE IS INFORMED OF ITS CHARACTER.

It is true that an infant's contracts are voidable, and that within a reasonable time after coming of age he must disaffirm the contract made during infancy. But if the infant, not knowing how to read or write, signed the contract in ignorance of its contents, and under the supposition that it was a receipt, he is not bound to disaffirm before he knows what he has done.

Harriet A. Heyer was at the time of the execution of the assignment of the land warrant, seventeen years old, and the wife of Jacob Heyer. She could neither read nor write. The instrument was not

read or explained to her. She understood that she was signing some receipt or formal paper. She received no money. See pages 39, 40, 42, 43, 49, 50, 94, 96, 97, 99, 107, 108, 110–114, 115, 146, 147, of the printed record.

In *Goodnow* v. *Empire Lumber Co.*, 31 Minn., 468, 472, it is decided "that a minor who executes a conveyance of real estate must disaffirm it within a reasonable time after he comes of age, or be barred of his right to do so. Where there is mere delay to disaffirm after coming of age, *and there is nothing to explain or excuse it, or show its necessity*, whether the delay is for more than a reasonable time is a question for the Court. A delay of three years, and a half, *unexplained*, is unreasonable. The rule holding certain contracts of an infant voidable, (among them his conveyances of real estate), and giving him the right to affirm or disaffirm after he arrives at majority, is for the protection of minors, and so that they shall not be prejudiced by acts done or obligations incurred at a time when they are not capable of determining what is for their interest to do."

This has no application to the action of the guardian. The minor is under no obligation to disaffirm for contracts made by a guardian in excess of his power. *Cox* v. *Manvel* (Minn.) 52 N. W. Rep., 273.

Contracts of the infant, in general, are *voidable;* contracts of a guardian for sale of property beyond his authority are VOID.

There was therefore no duty encumbent upon the children of George W. Remsen to disaffirm the act of their guardian when they attained their majority, but they could not do so in utter ignorance of such act.

IV.

THE IMPROVIDENT ISSUE OF THE PATENT IN THE ABSENCE OF THE COMPLAINANTS DID NOT DIVEST THEM OF THEIR RIGHTS.

The issue of the patent was *ex parte* and without notice to the infants who were interested in it. The assignee of the land warrant, to whom the patent was issued, was fixed with the knowledge of the fact that the assignment to him was invalid and the issue of the patent to him unlawful. He, therefore, took the title as trustee for the rightful claimants. The issue of the patent by the department to the wrong person was a ministerial act. It did not prevent a court of equity from inquiring into the matter and correcting the mistake by declaring the patentee a trustee.

"Where several parties set up conflicting claims to property, with which a special tribunal may deal, as between one party and the

Government, regardless of the rights of others, the latter may come into the courts and litigate the conflicting claims." *Garland* v. *Wynn*, 20 How., 6; *Comegys* v. *Vasse*, 1 Pet., 193; *Berthold* v. *McDonald*, 22 How., 6.

"Where a proceeding to set aside an entry for land was *ex parte* and without notice, a court of equity may inquire into the proceedings and afford relief." *Lindsey* v. *Hawes*, 2 Black, 554.

"The interpretation placed upon public land acts by the Secretary of the Interior is not binding upon the courts." *United States* v. *Murphy*, 32 F., 376; *Same* v. *Mann*, *Id.*, 386.

"Where the Secretary of the Interior, acting upon known facts, draws therefrom an erroneous conclusion of law, and in pursuance thereof issues a patent to a party not entitled thereto, his action is not conclusive, but is subject to review by the courts." *Southern Pac. Ry. Co.* v. *Wiggs*, 43 Fed. Rep., 333.

"The practice or opinion of the officers of the Land Department cannot control the action or the opinion of this court in expounding the law with reference to the rights of parties litigant before them." *Irvine* v. *Marshall*, 20 How., 558.

"But in issuing the patent to Dixon, as the assignee of Caldwell, the department acted ministerially, not judicially, and did not therefore, by its action, conclude Caldwell's rights, whatever they were." *Brush* v. *Ware*. 15 Pet., 107.

"A patent issued on such a warrant, appropriates the land, but leaves all equities between assignor and assignee open." *Brush* v. *Ware*, 15 Peters, 107, 108; *Bolden et ux.* v. *Massie's heirs et al.*, 5 Cond. Reg., 256; Ohio St. Rep., 459, note.

The learned counsel for the respondent has cited several cases to sustain the position "that whether the Orphans' Court had authorized the guardian to sell and assign this warrant, is a question of fact, which was to be, and was considered by the Department of the Interior in issuing the patent, and that the determination of the Department upon this question is conclusive, under the circumstances of this case."

In *Johnson* v. *Towsley*, 13 Wall, 72, it was decided that

"The general proposition is recognized that when a special tribunal is authorized to hear and determine certain matters arising in the course of its duties, its decision within the scope of its authority are conclusive. Under this principle the action of the Land Department in issuing a patent is conclusive in all courts and in all proceedings where by the rules of law the legal title must prevail. But the courts of equity, both in England and in this country, have always had the power in certain classes of cases to inquire into and correct injustice and wrong, in both judicial and executive action founded in fraud, mistake, or other special ground of equity, when private rights are invaded."

In this case, Mr. Justice Miller said, just after what is quoted by respondent's counsel:

"But we are not prepared to concede, that when, in the application of the facts as found by them, they, by misconstruction of the law, take from a party that to which he has acquired a legal right under the sanction of those laws, the courts are without power to give any relief." "On the other hand, it has constantly asserted the right of the proper courts to enquire, after the title had passed from the government, and the question became one of private right, whether, according to the established rules of equity, and the acts of Congress concerning the public lands, the party holding that title should hold absolutely as his own, or as trustee for another."

The land office acted in this case after hearing both sides.

In *Shepley* v. *Cowan*, 91 U. S., 330, it was decided that

Where a party has settled upon public land with a view to acquire a right of pre emption, the land being open to settlement, his right thus initiated is not prejudiced by a refusal of the local land-officers to receive his proofs of settlement, upon an erroneous opinion that the land is reserved from sale. The rulings of the Land Department on disputed questions of fact, made in a contested case as to the settlement and improvements of a pre-emption claimant, are not open to review by the courts when collaterally assailed."

It will be observed that the Land Department decided after hearing both sides.

Moore v. *Robbins*, 90 U. S. 530, decides that

"The decision of the Secretary of the Interior, against a purchaser at the public sales, in favor of a pre-emption claimant who had failed to make the required proof and payment, was erroneous, is a misconception of the law, and the equitable title should be decreed to belong to the purchaser. But when fraud or mistake or misconstruction of the law of the case exists, the United States, or any contesting claimant for the land, may have relief in a court of equity."

In this case, Mr. Justice Miller said:

"While conceding for the present to the fullest extent that when there is a question of *contested* right between private parties to receive from the United States a patent for any part of the public land, it belongs to the head of the Land Department to decide that question, it is equally clear that when the patent has been awarded to one of the contestants, and has been issued, delivered, and accepted, all right to control the title or to decide on the right to the title, has passed from the land office."

In *Quinby v. Conlan*, 104 U. S., 420, it is dicided, that where by misconstruing the law, those officers have withheld from a party his just rights, or misrepresentation and fraud have been practiced necessarily affecting their judgment, the courts may in a proper proceeding interfere and refuse to give effect to their action.

In *Smelting Company* v. *Kemp*, 104 U. S., 636, it was decided that

"If in the issuing of a patent the officers of that department take mistaken views of the law, or draw erroneous conclusions from the evidence, or act from either imperfect views of duty or corrupt motives, the party aggrieved cannot set up such matters in a court of law to defeat the patent. He must resort to a court of equity, where he can obtain relief, if his rights are injuriously affected by the existence of the patent, and he possesses such equities as will control the legal title vested in the patentee."

The department evidently took a mistaken view of the law in holding that an order or decree of the Orphans' Court was not necessary to pass the title of the minor children of the soldier, or else it drew an erroneous conclusion from the evidence. In either case, the minors who have never had a day in court may now be righted in a court of equity.

In *Steel* v. *Smelting Company*, 106 U. S., 447, it is decided that "A patent executed in the required form and by the proper officers, for such a portion of the public domain as is by law subject to sale or other disposal, passes the title thereto, and the finding of the facts of the Land Department which authorize its issue, is conclusive in a court of law. (*Smelting Co.* v. *Kemp*. 104 U. S., 636, cited upon this point and approved.) A party who claims to be aggrieved by such issue, although he cannot have the patent vacated or limited in its operation where it comes collaterally in question in an action for the recovery of possession, may obtain relief in a Court of Chancery, if he has such an equitable right as will estop the patentee or those claiming under him from asserting the legal title to the land. Otherwise such party must apply to the officers of the government, who, although not clothed with power to set the patent aside, may for that purpose bring suit in the name of the United States."

Lee v. *Johnson*, 116 U. S., 48, was a case in which Lee complained to the Land Office that Johnson had abandoned the land for more than six months, and a *contest* took place between them as to the right to the land. The usual proceedings were had before the Register, and the Commissioners decided in favor of Johnson. This was a contested case. In this case it was decided that

"If the officers of the Land Department mistake the law applicable to the facts or misconstrue the statutes and issue a patent to one not entitled to it, the party wronged can resort to a court of equity to correct the mistake and compel the transfer of the legal title to him as the true owner. The Court in such a case merely directs that to be done which those officers would have done if no error of law had been committed."

In Monroe Cattle Co. *v.* Becker, 147 U. S., 47, at 56, Mr. Justice Brown says:

"Defendant is positive that the subsequent issuing of a patent put an end to the equitable rights of the appellant, cannot be sustained,

either under the decisions of this court, or that of the Supreme Court of Texas. In the case of *Garland* v. *Wynn*, 20 How., 6, 8, the general rule was stated to be "that where several parties set up conflicting claims to property, with which a special tribunal may deal, as between one party and the government, regardless of the rights of others, the latter may come into the ordinary courts of justice, and litigate their conflicting claims. To the same effect are *Cunningham* v. *Ashley*, 14 How., 377; *Lytle* v. *Arkansas*, 22 How., 193, 203; *Betthold* v. *McDonald*, 22 How., 334; *Lindsey* v. *Hawes*, 2 Black, 554; *Shepley* v. *Cowan*, 91 U. S., 330; *Bohall* v. *Dilla*, 114 U. S., 47; *Sturr* v. *Beck*, 133 U. S., 541, 550. In the case of *Stark* v. *Starrs*, 6 Wall., 402, 419, these cases are said to be only applications of well established doctrine, that where one party has acquired the legal title to party, to which another has a better right, a court of equity will convert him into a trustee of the true owner, and compel him to convey the legal title. And in *Silver* v. *Cadd*, 7 Wall., 212, it was held that the proper retief was not the annullment and cancellation of the patent wrongfully issued, but was one founded upon the theory that the title which had passed from the United States to the defendant enured in equity to the benefit of the plaintiff, and that the decree should compel him to convey to the plaintiff or to have such conveyance made in his name by a commissioner appointed for the court for that purpose. See also, *Johnson* v. *Towsley*, 13 Wall., 72. It seems that this is also the law of Texas; *Todd* v. *Fisher*, 26 Tex., 239; *Mitchell* v. *Bass*, 26 Tex., 376; *League* v. *Rogan*, 59 Tex., 427; *Sherwood* v. *Fleming*, 25 Tex., 408, 427; *Wright* v. *Hawkins*, 28 Tex., 452."

V.

THE ISSUE OF THE PATENT RAISED NO PRESUMPTION CONTRARY TO THE RECORD AND THE TRUTH THAT THE ASSIGNMENT HAD BEEN AUTHORIZED BY THE ORPHANS COURT.

The testimony in this case makes it very certain that no special order was made by the Orphans Court authorizing the guardian to assign the warrant.

Alfred J. Fortin testified that he has made a very thorough examination of the index and the docket and that he can find no trace of such an order. That there is always a docket entry of such an order and that the same is indexed.

Besides, the fact that the land warrant itself does not recite such an order is the strongest negative evidence of its non-existence.

Thayer, Judge, in delivering the opinion of the circuit court of appeals in this case, says:

"But she (the guardian of the minor children) appeared to have obtained no order from the orphan's court aforesaid authorizing her to sell her children's interest therein" (in the land warrant).

If the plaintiffs have not been guilty of such laches as to bar their claim, the Court will not find a falsehood in order to defeat it.

The learned counsel argue that the officers of the Department of the Interior must have passed upon the fact and found that the order was made *because it was necessary* to be found. We submit that the court will not do violence to the facts in order to sustain the decision of the officers of the Department of the Interior. Else, in no case could a court of equity correct their errors.

The counsel cite a number of authorities upon the subject of presumption in support of titles, but in none of them are the presumptions declared to be *conclusive*, on the contrary in every case they may be repelled, as has been done in this case.

If a conclusive presumption has been raised that the infants' rights have been duly assigned, then they have been deprived of their property without due process of law. They have lost without a hearing. They are concluded without a day in court. Will a court of equity sanction such an iniquity?

VI.

BY THE ASSIGNMENT OF THE WARRANT AND THE SUBSEQUENT ISSUANCE OF THE PATENT TO TAYLOR A CONSTRUCTIVE TRUST WAS CREATED THROUGH A CONSTRUCTIVE FRAUD.

George W. Remsen having died, his widow, for herself and her minor children, made application to the Government for the land warrant, to which they were entitled in pursuance of the act of Congress. It was duly issued to them on the 30th day of February, A. D. 1848. The widow at the same time made application to the Government for a pension on account of the death of said decedent in the Mexican War. The application to the Government for the land warrant was made through an attorney, who received it, and before its delivery had made arrangement for its sale. As her counsel he presented a petition to the Orphans' Court of Philadelphia County for her appointment as guardian of the minor children of said decedent, all of whom were under fourteen years of age, except Harriet A., who, at that time, was under seventeen years of age and was married to one Jacob Heyer. On Oct. 6, 1848, said widow was appointed guardian of said minor children. The petition for her appointment as guardian contained an affidavit by the attorney that

the property likely to come into her hands as guardian would not exceed $100. The petition did not disclose the interest of the minors in the grant made to them, as evidenced by the land warrant, and no security was required by the said Orphans' Court of said guardian. Thereupon the said widow, on October 11, 1848, went before a magistrate or Justice of the Peace, and made her mark, to what purports to be an assignment of all her right, title and interest and all the right, title and interest of the said minor children in said land warrant, to one Nathan C. D. Taylor, for which she received $100, less counsel fees and expenses.

It appears from the testimony that, at the time of making her mark on said assignment, as her signature thereto, as guardian of said minor children as well as individually, she could neither read nor write, and that the contents thereof were not made known to her, although she thought it was for back pay or other moneys due her for the decedent's service in the Mexican War.

The assignment also purports to be signed by Harriet A. Remsen, the eldest child, although at that iime she was a *feme covert* under seventeen years of age. She could neither read nor write, and she never knew of the issuance of the land warrant or the assignment of the same.

In pursuance of this alleged assignment, the said Taylor, on the thirty first day of October, A. D. 1849, deposited the said land warrant in the land office at Stillwater, Minnesota, and did there elect to locate the same on the land in suit, in satisfaction of the same, as assignee of said widow in her own right and as guardian of said minor children, and on the twentieth day of March, 1850, a patent was granted by the government in satisfaction and cancellation of said land warrant and the location thereunder, which patent recited that the land was granted to said Taylor as assignee of said widow in her own right *and as guardian of the minor children of said decedent;* and on the twenty-eighth day of January, A. D. 1852, said patent was duly recorded in Ramsey County, in the State of Minnesota, in Book C of Deeds, page 288.

The sale could have been authorized by the Orphans' Court only upon a petition setting up the necessity of the sale, and a description of the minors' interests in the land to be sold, and if fraud had been attempted in a misleading petition as to the necessity of the sale or the character of the property or its value, the sale would not have been ordered, or it would not have been confirmed, and no title would have passed thereunder. The only peti-

tion presented to the Orphans' Court was the one for the appointment of the guardian, which fraudulently concealed its real object. Its purpose was to divest the minors' interest by a sale to the intending purchaser, who was cognizant of the illegality of the transaction.

When the vendee Taylor located this warrant and surrendered it for land, taking the patent in his own name (which occurred on March 20, 1850), the rightful owners had the right to adopt his location and surrender of the warrant and charge him as trustee of the land. This is on the theory of a constructive fraud, for it would be a fraud for him to retain the property of the rightful owner or the proceeds of that property. This is the plain principle which has been affirmed and acted on in the Supreme Court in numerous instances for over eighty years.

Massie v. *Watts*, 6 Cranch., 148, was a case of location by an agent. But the case of *Brush* v. *Ware*, 15 Peters, 93, is on all fours with this and cannot be distinguished. In that case Hockaday became entitled, for military service, to warrants for four thousand acres of land, and died leaving a will. Ware, his executor, sold the right of Hockaday to one Ladd for $40 and a pair of boots. The certificate of the executive counsel of Virginia which preceded the land warrants ran to the "representative of John Hockaday." The warrants ran to "Joseph Ladd, assignee of Robert S. Ware, executor of John Hockaday, deceased." Assignees of Ladd obtained patents. The suit was by the heirs of Hockaday. It was held that the executor had no authority to sell because it was real estate, and that the heirs were not concluded or effected by the issue of the patent, but *might charge the patentee as a trustee of the land and compel him to convey.*

In *Stark* v. *Starr*, 6 Wall, 419, this is said to be only an application of the well established doctrine that where one party has acquired the legal title to property to which another has a better right, a court of equity will convert him into a trustee for the true owner and compel him to convey a legal title.

In *Silver* v. *Ladd*, 7 Wall, 228, it was held that the proper form of relief was not the cancellation of the patent which passed the title out of the Government. This could not be done without revesting title in the United States and without the Government being a party, the true theory being that the title passed by the patent and inured in equity to plaintiff if he had a right superior to the patentee. See *Johnson* v. *Towsley*, 13 Wall, 72.

In *Meader* v. *Norton*, 11 Wall, 442, the patent was issued on a fabricated grant, the genuine grant having been destroyed. The Court held that the legal title went by the patent to the patentee; that the remedy was to charge the legal owner as trustee for the true owner and compel him to convey accordingly, saying, page 458:

"Persons claiming to hold the land against the patent cannot have relief in a suit at law, but courts of equity have full jurisdiction to relief against fraud or mistake, and that power plainly extends to cases where one man has procured the patent which belonged to another at the time the patent was issued."

So in *Widdicombe* v. *Childers*, 124 U. S., 400, Chief Justice Waite said: "Widdicombe, being a purchaser with full knowledge of their rights, was in law a purchaser in bad faith and, as their equities were superior to his, they were enforceable against him, even though he had secured a patent vesting the legal title in himself. Under such circumstances, a court of chancery can charge him as trustee and compel a conveyance which shall convert the superior equity into a paramount legal title. The cases to this effect are many and uniform. The holder of a legal title in bad faith must always yield to a superior equity. As against the United States his title may be good, but not as against one who had acquired a prior right from the United States in force when his purchase was made under which his patent issued. The patent vested him with the legal title, but it did not determine the equitable relations between him and third persons."

Felix v. *Patrick*, 145 U. S., 317, is a case where it is alleged that the script with which the land had been located had been fraudulently obtained by Patrick from Sophia Felix, an Indian. The law is carefully considered, the authorities cited and approved, including *Brush* v. *Ware*, and the law held to be that Sophia Felix could charge Patrick as trustee for the land and compel a conveyance. On the second point the Court held the plaintiff guilty of laches, and she was beaten on that ground. After thus fully disposing of the case, the Judge writing the opinion voices the only discordant note in the whole list of cases from 1810 down. He says what was clearly *obiter* and directly opposed to the first part of the decision, that justice only requires what the law would demand, repayment of the value of the scrip with legal interest. This was not only *obiter*, but clearly, we think, not the law, and is supported by no authority.

In the case of *Monroe Cattle Co.* v. *Becker*, 147 U. S., 47, the authorities are again reviewed and the rule we state referred to as well established doctrine.

In *Bernier* v. *Bernier*, 147 U. S., 242, it was held that where a patent for land is issued by mistake, inadvertence, or other cause, to parties not entitled to it, they will be declared trustees of the true owner, and decreed to convey the title to him.

The case of *Stoddard* v. *Smith*, 11 Ohio St., 581, is a case where a guardian made an unlawful sale of the interest of minors in land scrip. The Court charged the patentee as trustee of the land and compelled a conveyance, saying:

"Nor is it necessary to rest this case upon the character of the land certificates used in the purchase of the land. If instead of land scrip it had been bills of exchange, or other negotiable securities, or money held by Lowry belonging to these plaintiffs, and the same had been used by him, or by himself and associates, having notice of the fact, in the purchase of the lands, and payment of the purchase-money thereby made, the title being conveyed to the purchasers, or either of them, as in this case, a resulting trust would necessarily have arisen in favor of the parties whose funds had been so invested. And the plaintiffs would in such case have had their option, either to recover the value of the fund in money, or to enforce the trust in the lands. The case would still be one of that class of cases in which, it is said, a court of equity may act by creating a trust *in invitum*. Indeed, it may be regarded as a general rule, that in all cases where a party purchases trust property, knowing it to be such, from a trustee, courts of equity, when called upon, will force the trust upon the conscience of the delinquent intruder upon the trust, and compel him to perform it, and to hold the property subject to the trust, in the same manner that it was before held by the trustee."

The distinction between a constructive trust which originates in fraud, actual or constructive, and an implied trust which originates in contract, is clearly pointed out in the text writers.

Mr. Perry says in his work on Trusts, ch. 6, sec. 166:

"The trusts thus far considered arise from the express agreements and intentions of the parties, or from their intentions implied from their agreements. These trusts arise, result or are implied from the contracts and relations of the parties. The intention of the parties as manifested in contracts made in good faith is the foundation of them. There is another large class of trusts which arise from frauds committed by one party upon another. Such trusts are called constructive trusts. They differ from other trusts in that they are not within the intention or contemplation of the parties at the time the contract is made from which they are construed by the Court, but they are thrust upon a party contrary to his intention and against his consent."

These trusts which originate in actual or constructive fraud, are so designated merely to indicate the nature and extent of the relief which will be granted, and not as indicating the nature of the action founded thereon. The action on behalf of the beneficiary is founded on fraud, actual or constructive, and not on any contract relations between the parties. Thus, on sec. 166, Mr. Perry, in his work on Trusts, further says:

"When it is said that the person who fraudulently receives or possesses himself of trust property, or who has defrauded another of his estate by misrepresentation, concealment or other fraudulent practices, is converted by the Court into a trustee and ordered to account

for or reconvey the property, the expression is used for the purpose of describing the nature and extent of the remedy against him, and it denotes that the party defrauded or beneficially entitled, have the same rights and remedies against him as they would be entitled to against an express trustee who had fraudulently committed a breach of the trust. Generally speaking the constructive trust described in this chapter are not trusts at all in the strict and proper signification of the word "trusts"; but as courts are agreed in administering the same remedy in a certain class of frauds as are administered in a certain breach of trust, and as courts and the profession have concurred in calling such frauds constructive trusts, there can be no misapprehension in continuing the same phraseology, while a change might lead to confusion and misunderstanding."

Mr. Pomeroy says, Pomeroy's Eq. Juris., section 1044:

"The existence of the trust in all cases of this class might be referred to constructive fraud. This notion of fraud enters into the conception in all its possible degrees. Certain species of the constructive trusts arise from actual fraud; many others spring from the violation of some positive fiduciary obligation; in all the remaining instances there is, latent, perhaps, but none the less real, the necessary element of that unconscientious conduct which equity calls constructive fraud."

And section 1048:

"Equity impresses the trust upon the property in the hands of the transferee or the purchaser, compels him to perform the trust if it be active, and to hold the property subject to the trust, and renders him liable to all the remedies which may be proper for enforcing the rights of the beneficiary. It is not necessary that such transferee or purchaser should be guilty of positive fraud, or should actually intend a violation of the trust obligation; it is sufficient that he acquires property upon which a trust is in fact impressed, and that he is not a *bona fide* purchaser for a valuable consideration and without notice."

Mr. Smith, in his Principles of Equity on page 84, says:

"When on the ground of justice and good conscience, without reference to the intentions of the parties, equity considers the holders of the legal estate to be not entitled to enjoy the equitable or beneficial interest, it treats him as trustee. Trusts thus created are called constructive trusts."

Such has also been the holding of the Supreme Court of Minnesota, and these decisions have been approved by the Supreme Court of the United States in a case from Minnesota.

In *Cook* v. *Van Etten*, 130 U. S., 648, the plaintiff sent to the defendant money to be loaned for the plaintiff; the defendant, without any intent to defraud the plaintiff, loaned the money with other money in his own name. It was agreed between the parties that the defendant should retain all over 20 per cent per annum as his compensation. The plaintiff did not discover until within six years before the commencement of the action that the defendant had

loaned the money in his own name; hence the Court held that the basis of the action was constructive fraud and within subdivision 6, of section 6, ch. 66 of General Statutes of Minnesota, *infra.*

The Court said: "While the defendant may not thus have intended, and we suppose did not intend, to perpetrate a positive fraud upon the plaintiff, nevertheless it was, in the eye of the law, a fraud, being a secret and intentional violation of the private confidence reposed in him. "Judge Story says: 'Fraud, indeed, in the sense of a court of equity, properly includes all acts, omissions and concealments, which involve a breach of legal or equitable duty, trust or confidence, justly reposed, and are injurious to another.' 1 Story Eq., sec. 187; *Gale* v. *Bale*, 19 Barb., 257. In section 307, 1 Story's Eq., the author says: 'The second head of constructive frauds includes those which arise from some peculiar confidential or fiduciary relation between the parties. In this class of cases there is often to be found some intermixture of deceit, imposition, overreaching, unconscionable advantage, or other mark of direct and positive fraud. But the principle, on which courts of equity act in regard thereto, stands, independent of any such ingredients, upon a motive of general public policy. These Courts will, therefore, often interfere in such cases, where, but for a peculiar relation, they would either abstain wholly from granting relief, or would grant it in a very modified and abstemious manner.' See also ib., sec. 322." "The facts alleged in the complaint, and found by the referee, show that the defendants acts in the premises were fraudulent in the eye of the law."

Mr. Pomeroy says again, at sec. 155:

"All instances of constructive trusts may be referred to what equity denominates fraud, either actual or constructive, including acts or omissions in violation of fiduciary obligations. If one party obtains the legal title to the property, not only by fraud, or by violation of confidence, or of fiduciary relations, but in any other unconscientious manner, so that he cannot equitably retain the property which really belongs to another; equity carries out its theory of a double ownership—equitable and legal, by impressing a constructive trust upon the property in favor of the one who is in good conscience entitled to it, and who is considered in equity as the beneficial owner."

Mr. Lewin says—Lewin on Trusts, ch. 8, sec. 2—defining implied trusts:

"Wherever a person, having a power of disposition over property manifests any intention with respect to it in favor of another, the court, where there is sufficient consideration, or in a will where consideration is implied, will execute that intention through the medium of a trust, however informal the language in which it happens to be expressed."

In ch. 10, subd. 1, defining constructive trusts, Mr. Levin says:

"A constructive trust is raised by a court of equity wherever a person, clothed with fiduciary character, gains some personal advantage by availing himself of his situation as trustee; for as it is im-

possible that a trustee should be allowed to make a profit by his office, it follows that so soon as the advantage in question is shown to have been acquired through the medium of a trust, the trustee, however good a legal title he may have, will be decreed in equity to hold for the benefit of his *cestui que trust*."

And, in a note to this subdivision, it is said: "Constructive trusts constitute a most important part of the machinery made use of by courts of equity in administering justice. They arise out of fraud, actual or constructive, and are called into being in order to obviate its effects, and by no real presumed intention of the parties to them. In this they differ from other trusts."

Until the issuance of the patent, the assignment of the land warrant, and entry thereunder upon the land in question, conveyed only an equitable interest; the issuance of the patent, however, to Taylor vested in him the legal estate; but this did not bar the prior equities of the minor children, as to them he was their trustee as well as co-tenant.

Massie *v.* Watts, 6 Cranch, 148.
Irvine *v.* Marshall, 20 How., 558.
Brush *v.* Ware, 15 Pet., 108.
Stark *v.* Starrs, 6 Wall., 402, 419.
Neader *v.* Norton, 11 Wall., 442, 458.
Widdicombe *v.* Childers, 124 U. S., 400, 405.
Felix *v.* Patrick, 145 U. S., 328.

Mr. Justice Brown after quoting the above authorities in his discision in *Felix* v. *Patrick*, *supra*, says:

"The substance of these authorities is that, whenever a person obtains the legal title to lands by any artificial concealment or by making use of facilities intended for the benefit of another, a Court of Equity will impress upon the lands so held by him a trust in favor of the party who is justly entitled to them, and will order the trust executed by decreeing their conveyance to the party in whose favor the trust was created * * * * * * and the *cestui que trust* is at liberty upon discovering the trust to affirm, and enforce its execution."

In general, whenever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentation, concealment or through undue influence, taking advantage of one's weakness or necessities or through any similar means or any other similar circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest equity empresses an constructive trust on the property thus acquired.

2 Pom. Eq. Jur., sec. 1053.
Story, Eq. Jur., sec. 1265.

Bispham, Eq., sec. 91.
Perry, Tr., sec. 166.
Small v. *Attwood*, Younge, 507.
Importers and Traders Nat. Bank v. *Peters*, 123 N. Y., 272.

"A certificate of entry or location under a military land warrant vests in the holder an equitable title to the land and gives him a right to the patent when issued; and if he conveys the land or assigns the certificate, and afterwards obtains a patent, he becomes under the statute (sec. 2414), as well as upon plainest principles of equity, a trustee for the person to whom he had or his assignee. *Gray* v. *Jones*, 14 Fed. Rep., 83; *Key* v. *Jennings*, 66 Mo., 356; *Wirth* v. *Branson*, 98 U. S., 118; *Stinson* v. *Geer*, 42 Kan., 520."

19 Am. & Eng. Enc. of Law, 330.

If anything is needed to make this proposition clearer it is that Taylor was not wholly or absolutely an unlawful holder of this scrip. He was tenant in common with the minor heirs. He was placed in a special relation of trust and confidence with respect to the subject of his purchase and could not retain it for his own benefit, but was bound to hold it in trust. This rule extends to joint and common tenants.

Nesbit v. *Tredennick*, 1 Ball. & B., 46.
Van Epps v. *Van Epps*, 9 Paige, 237.
Tanner v. *Elworthy*, 4 Beav., 487.

VII.

THE SUCCESSIVE GRANTEES OF TAYLOR WERE FIXED WITH CONSTRUCTIVE NOTICE OF ALL, THAT THE RECORDS IN WASHINGTON AND IN MINNESOTA CONTAINED RELATIVE TO THE TITLE OF THE LAND, INCLUDING THE GUARDIAN'S WANT OF AUTHORITY.

In this suit the question as to whether the defendants, who acquire their titles under the patent to Taylor, are chargeable with notice of the trust and co-tenancy is too plain to admit of any doubt.

The doctrine of notice has been considered applicable to these military titles as in other cases.

The entry on the books at the Land Office at Stillwater, Minnesota, a short distance from the *locus in quo*, was the incipient step in the acquisition of this title. The entry only could be made by the filing of the warrant or certified copy thereof in this office when a location of the land is made, which is returned to the General Land Office at Washington, D. C., together with the original land warrant, when

a patent is issued to the person apparently entitled to it. The officers of the land department acting only ministerially in the matter.

The patent therefor conveys the legal title, leaving prior equities open to investigation.

The defendants deny that they ever saw the warrant. Pusey alone, Tatum's grantor, affirms that he knew it was located with a warrant, but did not examine it or cause it to be examined. But the question is, not whether they did see the warrant and the patent, but whether they were not bound to see it. They were bound to examine into their muniments of title, and their failure to do so is such negligence as will afford them no protection in a court of equity.

The statements in the warrant were copied into the patent under which the defendants deduce their title, which recited that the right originally belonged to Remsen and had descended to his widow and minor children and had been assigned by their guardian, the said widow—the warrant and the patent thereupon showed the defendants that this right which pertained to realty had been assigned by their guardian without any recital therein, that said guardian had "been duly authorized by the Orphans' or other Court having probate jurisdiction and having power to sell or dispose of such certificate or warrant for the benefit of those interested," as provided for by the Act of Congress of February 11, 1847. (9th U. S., at L., page 125.)

Was not this notice?

How can these defendants claim as innocent purchasers under such circumstances? (*Brush* v. *Ware*, 15 Peters, 111.) For wherever upon the face of the title papers, the purchaser has full means of acquiring complete knowledge of the title, from the references therein made, he will be deemed to have constructive notice thereof.

Oliver v. *Piatt*, 3 Howard, 333.
Cowell v. *Spring Co.*, 100 U. S., 58.
Ins. Co. v. *Eldredge*, 102 U. S., 547.
Sanford v. *Sanford*, 139 U. S., 642.

"The general proposition of law concerning constructive notice is, that if facts are brought to the knowledge of a party which would put him, as a man of common sagacity, upon inquiry; and if he fail to do so, or to do so properly, whether fraudulently or only negligently, he will be chargeable with notice of what he might have learned upon reasonable examination. *Warren* v. *Swett*, 31 N. H., 332; *Cambridge Bank* v, *Delano*, 48 N. Y., 326; *Acer* v. *Wescott*, 46 N. Y., 384; *Willis* v. *Valletto*, 4 Met. (Ky.), 186; *Russell* v. *Ranson*, 70 Ill., 167; *Watt* v. *Scofield*, *Ib.*, 201; *Dickey* v. *Lyon*, 19 Iowa, 544; *Wood-*

worth v. *Paige*, 5 Ohio St., 70; *James* v. *Drake*, 3 Sneed, 540; *Colquitt* v. *Thomas*, 8 Ga., 258; *Martell* v. *Somers*, 26 Texas, 551; *Jones* v. *Smith*, 1 How., 43; *Kennedy* v. *Green*, 3 Mylne & K., 699, 718."

1 Biglow on Frauds, 386.

"According to our laws a purchaser (It seems that the registry is not notice to all the world, but only to those who are bound to make search. *Maul* v. *Rider*, 59 Penn. St., 167) is constructively affected by the registration of a deed required to be put on record with such knowledge as the index entries afford, and, if they are such as necessarily put a cautious and prudent man upon inquiry, such inquiry will be considered to have been made, and knowledge fixed accordingly. *Bostwick* v. *Powers*, 12 Iowa, 456; *Doyle* v. *Teas*, 4 Scam, 202. But this is not the extent of the rule concerning notice by registration, as held by some of our courts. The doctrine has been carried so far as to require a purchaser to take notice of that of which he can in fact have no knowledge from the books of registration, except by examining every recorded instrument therein. Thus it has been decided that the registration of a deed required to be recorded constitutes notice to subsequent purchasers, though the record of the instrument be not indexed. *Mutual Life Ins. Co.* v. *Dake*, 4 Cent., L. J., 340; *Curtis* v. *Lyman*, 24 Vt., 338; *Bishop* v. *Sneider*,, 46 Mo., 472. See also *Schette* v. *Stein*, 76 Penn. St., 398; *Chatham* v. *Bradford*, 50 Ga., 327, and other cases cited in the Central Law Journal, *et supra*.

1 Biglow on Fraud, 400.

"It may be stated, then, as a rule applicable to all the States, that where an instrument by which the title to real estate if effected is properly recorded, the record thereof is constructive notice to subsequent purchases or encumbrances under the same grantor. *Cushing* v. *Ayr*, 25 Me., 383; *Mason* v. *Martin*, 4 Md., 124; *Vaughan* v. *Greer*, 38 Texas, 530; *Mayo* v. *Cartright*, 30 Ark., 407; *Randolph* v. *West. L. R. R. Co.*, 28 N. J., Eq. 49."

Wade on Law of Notice, 54.

"In America the doctrine has been settled, and it is uniformly held that the registration of a conveyance operates as constructive notice to all subsequent purchasers of any estate legal or equitable in the same property. *Parkhurst* v. *Alexander*, 1 John. Ch. R. 394. The reasoning upon which this doctrine is founded is the obvious policy of the registry acts, the duty of the party purchasing under such circumstances to search for prior encumbrances, the means of which search are within his power, and the danger (so forcibly alluded to by Lord Hardwicke) of letting in parol proof of notice or want of notice of the actual existence of the conveyance, *Hine* v. *Dodd*, 2 Atk., 275."

Story's Equity, Jurisprudence Sec.

The case of *Brush* v. *Ware*, above cited, establishes conclusively that the purchasers under Taylor bought with notice. See also *Cox* v. *Manvel*, 52 N. W. Rep., 273.

The warrant on its back showed that the children of Remsen (except Harriet A.) were minors. It did not purport to be assigned by them, but by a guardian. Taylor and his vendees were bound to look to the power of the guardian, for under the act of Congress the guardian could not sell except under a proper decree of court.

The patent recited the act of Congress, the names of the Remsen children, the fact that they were minors, and that the warrant had been assigned as to their interest by their guardian. Every purchaser under the patent had all the facts brought to his notice which rendered the assignment void, unless a decree of the Orphan's Court authorized the sale, which was not recited. He was bound to ascertain the fact as to this decree.

It may be urged that the plaintiffs ought to have known the law from 1848 to 1890, and consequently to have known that they were entitled to a land warrant. But here, where it is not a question as to the *observance* of any law by plaintiffs, but simply a question of what actual knowledge they did have in fact, it is perfectly open to them to say that they did not know of the existence of the law. The maxim is accurately stated "ignorance of the law excuses no one," not "every man is bound to know the law." And the statement of the maxim indicates its limitations.

Brooms' Legal Maxims, 253.

The subject may be well summed up by the collation of two or three cases which show the substantial uniformity of the application of the doctrine. "The maxim *ignorantia legis neminem excusat* is not universally applicable, but only when damages have been inflicted or crimes committed. It is true that the law will not permit the excuse of ignorance of the law to be pleaded for the purpose of exempting persons from damages for a breach of contract, or from punishment for crimes committed by them, but on other occasions and for other purposes, it is evident that the fact that such ignorance existed will sometimes be recognized so as to affect a judicial decision." 44 N. J. L., 244. And, "There is no maxim which says that for all intents and purposes a person must be taken to know the legal consequence of his acts." Lush, J., in L. R., 3 Q. B., 639. "It would be too much to impute knowledge of this rule of equity" (the doctrtne of election). Westbury, Ld. Ch., in 11 H. L. Cas, 602.

Bouvier's Law Dictionary, page 978.

The statement of the complainants that they were ignorant of

their right to receive from the Government a land warrant for 160 acres is perfectly reasonable and probable. What proportion of people in their station of life know the rights of a Mexican soldier to a land warrant? Very few.

VIII.

THE COMPLAINANTS HAVE A RIGHT TO ADOPT AND RATIFY THE LOCATION OF THE PATENT BY THEIR CONSTRUCTIVE TRUSTEE.

The bill of complaint sets forth the facts from which it can be fairly inferred that Taylor acted in bad faith, and declares that "the defendants falsely pretend and claim that the sale of the said land warrant to him was made in good faith, etc., which claim and pretence is in no respect true." This allegation is supported by strong evidence of bad faith or fraud. The bill certainly makes out a case of constructive fraud and constructive trust, and thereupon asks that the constructive trustees may be declared to hold in trust for complainants, who have adopted and ratified the act by which the legal title passed into the said trustees. The learned counsel contend that this cannot be done, for that when we recognize the legal title in the defendants we discharge them of any trust. This is contrary to the uniform current of authorities hereinbefore cited.

Massie *v.* Watts, 6 Cranch., 148.
Bagnell *v.* Broderick, 12 Peters, 436.
Bank of Metropolis *v.* Guttschlick, 14 Peters, 1631.
Brush *v.* Ware, 15 Pet., 93.
Patterson *v.* Wynn, 11 Wheat., 380.
Irvine *v.* Marshall, 20 How., 558.
Townsend *v.* Greeley, 5 Wall., 326, 335.
Stark *v.* Starrs, 6 Wall., 402, 419.
Silver *v.* Ladd, 7 Wall., 419.
Meader *v.* Norton, 11 Wall., 442, 458.
Johnson *v.* Towsley, 13 Wall., 72, 87.
Carpentier *v.* Montgomery, 13 Wall., 496.
Shepley *v.* Cowan, 91 U. S., 330, 340.
Moore *v.* Robbins, 96 U. S., 530, 535.
Worth *v.* Branson, 98 U. S., 118, 121.
Marquez *v.* Trisbie, 101 U. S., 473, 475.
Felix *v.* Patrick, 145 U. S., 317.
And other cases cited *supra*.

In *Irvine* v. *Marshall*, 20 How., 558, it was held that,

"Although the officers of the land department may in practice, and as a rule of conveyance, have received the certificate of purchase as evidence of title, yet neither the practice nor the certificate itself can control the power either of the United States or of this Court, to adjudge or confirm the title to the land to the true owner."

In *Stark* v. *Starrs*, 6 Wall., 402, at 419, Mr. Justice Field said:

"These are only applications of the well-established doctrine that where one party has acquired the legal title to property to which another has the better right, a court of equity will convert him into a trustee of the true owner, and compel him to convey the legal title."

In *Meader* v. *Norton*, 11 Wall., 442, at 457, Mr. Justice Clifford said:

"Argument is not necessary to show that a patent in a suit at law is conclusive of title against the United States, and all others claiming under the United States by a junior title. Until the patent issues the fee is in the government, but when it issues the legal title passes to the patentee. Persons claiming to hold the land against the patent, cannot have relief in a suit at law, but courts of equity have full jurisdiction to relieve against fraud or mistake, and that power plainly extends to cases where one man has procured the patent which belonged to another at the time the patent was issued. *Bagnell* v. *Broderick*, 13 Pet, 435; *Patterson* v. *Wynn*, 11 Wheat., 380."

In *Felix* v. *Patrick*, 145 U. S., 317, at page 327, Mr. Justice Brown says:

"Having, then, no right to locate the scrip for his own benefit, he must be deemed to have located it for Sophia Felix and as her representative. It was declared by this court as early as 1810, in the case of *Massie* v. *Watts*, 6 Cranch, 148, that if an agent located land for himself which he ought to locate for his principal, he is in equity a trustee for his principal. In that case the defendant Massie had contracted with one O'Neal to locate and survey for him a military warrant for 4,000 acres in his name. Massie located the warrant with the proper surveyor, and, being himself a surveyor, fraudulently made a survey purporting to be a survey of the entry, but variant from the same, so that the land actually surveyed was not the land entered with the surveyor. This was done for the fraudulent purpose of giving way to a claim of the defendants which he surveyed on the land entered for the plaintiff, whereby the plaintiff lost the land, and defendant obtained the legal title. This court held that Massie held such land as trustee for O'Neal. 'But Massie,' said Chief Justice Marshall, (p. 169,) 'the agent of O'Neal, has entered and surveyed a portion of that land for himself, and obtained a patent for it in his own name. According to the clearest and best established principles of equity, the agent who so acts becomes a trustee for his principal. He cannot hold the land under an entry for himself otherwise than as trustee for his principal.' This case was subsequently

cited with approval in *Irvine* v. *Marshall*, 20 How., 558. So in *Brush* v. *Ware*, 15 Peters, 93, where an executor obtained a certificate for 4,000 acres of land, and afterwards sold and assigned the same, when it appeared under the will that he had no right to sell the land, it was held that the purchaser to whom the patent was subsequently issued, took with notice of the prior title of the heirs, and was bound to make the conveyance asked from him. To the same effect are *Stark* v. *Starrs*, 6 Wall, 402, 419; *Meader* v. *Norton*, 11 Wall, 442, 458. And in *Widdecombe* v. *Childers*, 124 U. S., 400, 405, it was held that a person who had obtained a patent to lands which the patentee knew he had no right to claim, took the legal title subject to the superior equities of the rightful owner. In delivering the opinion, Chief Justice Waite said: 'The holder of a legal title in bad faith must always yield to a superior equity. As against the United States his title may be good, but not as against one who had acquired a prior right from the United States in force when his purchase was made under which his patent issued. The patent vested him with the legal title, but it did not determine the equitable relations between him and third persons.' See also *Morris* v. *Joseph*, 1 West Va., 256. The substance of these authorities is that, whenever a person obtains the legal title to land by any artifice or concealment, or by making use of facilities intended for the benefit of another, a court of equity will impress upon the lands so held by him a trust in favor of the party who is justly entitled to them, and will order the trust executed by decreeing their conveyance to the party in whose favor the trust was created. It is of no consequence in this connection that Sophia Felix was ignorant of the defendant's acts, or of the trust thereby created, *since she was at liberty upon discovering it, to affirm the trust and enforce its execution.* *Bank of Metropolis* v. *Guttschlick*, 14 Peters, 19, 31; *Moses* v. *Murgatroyd*, 1 Johns, Ch. 119; *Cumberland* v. *Codrington*, 3 Johns., Ch. 229, 261; *Neilson* v. *Blight*, 1 John. Cas 205; *Weston* v. *Barker*, 12 Johns., 276."

IX.

THE STATUTES OF LIMITATION OF MINNESOTA DO NOT APPLY TO A SUIT IN THE FEDERAL COURT WHICH IS PURELY EQUITABLE.

"As to matters of equitable cognizance merely, unless in express terms it is made applicable thereto, the statute of limitations does not apply. In other words, the statute is not binding on courts of chancery in cases of exclusive equitable cognizance. But the court often refuses to interfere where there has been gross laches or a long or unreasonable acquiescence in the assertion of adverse claims, and adopts in cases to which the statute does not strictly apply, a period within which its aid must be sought, similar to that prescribed in analogous cases at law. (*Askew* v. *Hooper*, 28 Ala., 634.) But where the claim is purely equitable, unless expressly so provided, the statute does not apply thereto, and the lapse of time, however long, will

not deprive a party of his remedy thereon if there is a reasonable excuse for delay, (*Pitzer* v. *Burns*, 7 W. Va., 64; *Askew* v. *Hooper*, 28 Ala., 634; *Keaton* v. *McGwier*, 24 Ga., 217; *Burden* v. *Stein*, 27 Ala., 104; *Union Bank* v. *Stafford*, 12 How. (U. S.), 327; *Wood* v. *Ford*, 29 Miss., 57,) as the court will not allow a just claim to be defeated simply because of the lapse of time, if the party has not, in view of the circumstances, been guilty of unreasonable delay."

Locke *v.* Caldwell, 91 Ill., 417.
1st Wood on Limitations, page 144.

In the consideration of purely equitable rights and titles, courts of equity are not governed by the statute of limitations.

Gest *v.* Packwood, 39 Fed. Rep., 525.

X.

THE COMPLAINANTS' RIGHT IS NOT BARRED BY THE STATUTE OF LIMITATIONS.

The statutes in force in the State of Minnesota when this suit was commenced were as follows:

"Actions can only be commenced within the period prescribed within this chapter after the cause of action accrues, except where in special cases a different limitation is prescribed by statute. (G. S. Minn., 1894, sec. 5133; G. S. 1866, ch. 66, sec. 3; G. S., 1878, ch. 66, sec. 3).

Within the fifteen years' limitation.

"No action for the recovery of real property or for the recovery of the possession thereof, shall be maintained unless it appears that the plaintiff, his ancestor, predecessor or grantor was seized or possessed of the premises in question within fifteen years before the commencement of action. The period prescribed in the preceding sections for the commencement of actions are as follows:" (Id. sec. 5134; G. S., 1866, ch. 66, sec. 4; G. S., 1878, ch. 66, sec 4, as amended 1889, session laws, ch. 91, sec. 1.)

There are two other statutes of Minnesota, being subdivisions 6 and 7 of sec. 6, ch. 66, of the General Statutes. These clauses read as follows, and are

Within the six years limitation:

"Sixth. An action for relief on the ground of fraud; the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud.

"Seventh. Actions to enforce a trust or compel an accounting, where the trustee has neglected to discharge his trust, or has repudiated the trust relation, or has fully performed the same."

(*Id.*, sec. 5136; G. S. 1866, ch. 66, sec. 6, as amended 1877, Session Laws, ch. 24, sec. 1; G. S. 1878, ch. 66, sec. 6.)

Fifteen years limitation.

The defendants evidently abandoned any effort to show title by adverse occupation for fifteen years, under the Minnesota statute, and the testimony does not support such a claim.

If this statute governs the case, the suit was brought in season, as to all of the land except the right-of-way conveyed to the Minnesota and Pacific Railroad Co. in 1858, upon which it laid its tracts in 1862. The rest of the land was not occupied until 1880, and subsequent years. See defendants, Ex. No. 11 and pages 159, 160, 163, 184, 19 2and 196 of the printed record. If in order to defeat the complainants, it is necessary for the defendants to show that they have been in the adverse possession of this land for fifteen years before the beginning of this action, they have failed to do so except as to the aforesaid right-of way.

Ryder *v.* Emrich, 104 Ill., 474.
Kane County *v.* Herrington, 50 Ill., 239.

"If the legal estate would not be barred at law by the statute of limitations, the equitable estate would not be barred in equity by lapse of time."

3 Wait., Act. and Def., pp. 197, 198.

"If a legal title would in ejectment be barred by twenty years' adverse possession (*Shorter* v. *Smith*, 56 Ala., 208), courts of equity will act upon the like limitation and apply it to all cases of relief sought upon equitable titles or claims touching real estate."

1 Story's Eq. Jurisprudence, p. 155.

The complainants are seeking relief upon their equitable title.

Six Years' Limitations.

If the fifteen years' statute does not apply in this case, then the sixth subdivision of section 6, chapter 66 of the General Statutes of Minnesota (six years) does apply; (unless, of course, it be held that being a purely equitable suit in the federal court, it is not affected by any state statute of limitations.)

The seventh subdivision does not apply. It clearly relates to trusts founded on contract, that is, to express or implied trusts, not to trusts which are raised by actual or constructive fraud or mistake, not to constructive trusts.

Sage *v.* St. Paul, etc. Ry. Co., 44 Fed. Rep., 817,
St. Paul etc. Ry. Co. *v.* Sage. 49 Fed. Rep., 310.

Cook *v.* Van Ellen, 30 U. S., 648.
Rolf *v.* Gregory, 34 N. J., Eq., 224.
Lewis *v.* Welsh, 47 Minn., 193.

In *Sage* v. *St. Paul etc., Ry. Co.*, 44 Fed Rep., (affirmed in 49 Fed. Rep., 315, on this point), it was held that,

"Where a railroad company has complied with an act of Congress granting land to the State of Minnesota for railroad purposes, and with the state law transferring the grant to it, a transfer by the state to another company is a constructive fraud, as the lands are held by the state in trust for the former company; and an action to recover such land is not governed by General Statutes of Minnesota, chapter 66, title 2, section 6, subdivision 7, which specifies the period of limitations for 'actions to enforce a trust or compel an accounting,' but by subdivision 6, which relates to actions 'for relief on the ground of fraud,' and specifies that the cause of action shall not be deemed to have accrued until a discovery of the fraud."

The case of *Burk* v. *Western Land Association*, 40 Minn., 506, is cited by the defendants to show that the seventh subdivision applies to the case of a constructive trust.

This case was a plain mistake, based on considering such trusts as the present one, implied trusts, instead of constructive trusts. We are warranted in saying that it is not a precedent in the Court which decided it, and will doubtless be overruled at the first opportunity. We say this with the greatest respect for the Supreme Court of Minnesota, and for the accurate Judge who wrote the opinion in the Burk case.

It is one of those lapses which the best of lawyers and judges are occasionally guilty of. The Circuit Court of Appeals, as well as Judge Nelson, in the Circuit Court, saw this in the Sage case. It is sufficiently proven by the case of *Lewis* v. *Welsh*, 47 Minn., 193. In this last case, which was a constructive trust arising from constructive, not actual, fraud, the court held subdivision 6 to apply, and though expressly referring to subdivision 7 (opinion, p. 203), refused to apply it. If subdivision 7 properly applied in the Burk case, it applied equally in *Lewis* v. *Welsh*, and that case was wrongly decided.

The statute uses the language, "discovery of the facts constituting the fraud." There is no reason why this should be limited to actual, moral fraud. The purpose of the statute is to preserve the rights of one who is innocently ignorant of the facts constituting his cause of action in certain cases, whether it be founded on actual or legal fraud. The same reason for the statute holds good if the facts con-

stitute a constructive fraud. The victim of such fraud is equally entitled to protection.

The statute (subdivision 6) did not begin to run till the discovery of the facts constituting the constructive fraud.

Where there has been no negligence or laches on the part of a plaintiff in coming to the knowledge of a fraud, the statute of limitations does not begin to run until the fraud is discovered by, or becomes known to, the party suing or those in privity with him.

Bailey *v.* Glover, 21 Wall., 342, 349.
Jones *v.* Van Doren, 130 U. S., 684.
Avery *v.* Cleary, 132 U. S., 604.
In re Crosley, L. R., 35, Ch. Div., 266.
Hovenden *v.* Lord Annesley, 2 Sch. & Lefr., 634.
South Sea Company *v.* Wymondsell, 3 P. Will., 143.
Delraine *v.* Brown, 19 Conn., 421.
Relf *v.* Everly, 23 Iowa, 467.

"The statute of limitations does not run against a party to bar his right of action for the correction of a mistake, until he discovers the mistake, or until he might discover it by pursuing inquiries suggested *by facts within his knowledge.*"

Manatt *v.* Starr, 72 Iowa, 677.

"The knowledge which will set the statute in operation must be of the *fundamental fact* from which the conclusion of fraudulent intent is drawn. Thus, where a conveyance purports, on its face, to be for a valuable consideration, knowledge of its existence, and of the fact that the grantor is insolvent cannot be deemed knowledge of facts constituting a fraud; for the controlling fact upon the question of fraud in such case is that the conveyance is without consideration, and until that fact is known the party is deemed ignorant of the fraud."

Erickson *v.* Quinn, 47 N. Y., 410.
Beach on Modern Equity Jurisprudence, page 88.

In Evans' appeal, 81 Pa. St. Rep., 278, cited by defendant's counsel, it was decided, that as a general rule, a constructive trust as to personal rights may be asserted at any time within six years after the knowledge of the facts creating it.

Oliver v. *Piatt*, 3 How., 332, decides that,

"Lapse of time is no bar to a subsisting trust in real property. The bar does not begin to run until knowledge of some overt act of

an adverse claim or right set up by the trustee is brought home to the *cestui que trust*. The lapse of any period less than twenty years will not bar the *cestui que trust* of his remedy in equity, although he may have been guilty of some negligence, where the suit is brought against his trustee, who is guilty of the breach of trust, or others claiming under him with notice."

In *Reynolds* v. *Summer*, 126 Ill., 58, it is decided that the statute of limitations does not begin to run against a trust so long as it is acknowledged to exist by the trustee, nor until it is repudiated and disallowed by him. Possession, to create a bar under the statute, must be open, notorious and adverse or hostile to the party sought to be barred. Where it is taken by a trustee or agent, it is the possession of the *cestui que trust* or principal, and cannot be adverse until the trust is openly disavowed or denied, and this fact is brought home to the knowledge of the *cestui que trust*.

We submit that there has been no such laches on the part of the appellants as would set the statute of limitations in motion.

The case of *St. Paul, etc., Ry. Co.* v. *Sage*, 49 Fed. Rep., 315, is cited by the defendants' counsel to support the proposition that the sixth subdivision of the sixth section of chapter 66 of the General Statutes of Minnesota applies to such a constructive fraud and such a constructive trust as is presented in the present case.

The subdivision reads as follows:

"Sixth. An action for relief on the ground of fraud; the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud."

The case decides that this subdivision applies to a case where the legal title was acquired wrongfully but *without actual fraud*, and where the person who has so become invested with the legal title refuses to convey the same to the real owner. We have no quarrel with this case. If it has any application, we conceive that it is most favorable to the appellants.

The Court says, at page 321:

"This subdivision covers actions for relief on the ground of fraud, and as the statute is undeniably intended to include proceedings at law and in equity, it may well be argued that the clause includes not only such *actual* frauds as may form the basis for actions at law, but also such transactions as a court of equity will adjudge to be frauds, actual or *constructive*, thus including cases wherein a party having become vested with the title of property rightfully belonging to another, refuses to convey the same to the real owner, or to account to him for the value thereof, in case the same has been sold and the money appropriated by the one not entitled thereto, which

withholding of the money or its proceeds, would be deemed to be fraud upon the rights of the real owner."

If it applies to the constructive fraud of refusing to convey the title of land to the true owner, it applies with greater force to the constructive fraud of acquiring for one's self the title which a court of conscience will force him to reconvey.

It being conceded, as contended by the learned counsel, that the fraud referred to in the statute may be either *actual or constructive*, one or the other of which is necessary to sustain a constructive trust, it follows that a suit will be commenced in season, if it is begun within six years from the discovery of the facts constituting the actual or constructive fraud. Such facts in the present case are:

First, that the Remsen children had an interest in a land warrant.

Second, that it was conveyed by their guardian to Taylor.

Third, that she acted without authority of court.

Fourth, that the warrant was located in Minnesota

Fifth, that the defendants purchased and occupy the lands and refuse to restore the same.

Of all these facts the applicants, other than Mrs. Wetzel, and perhaps Harriet A. Heyer (now Van Zandt) were profoundly ignorant until a short time before the commencement of this suit.

The bill of complaint explains the reason for the delay. The evidence fully sustains the allegations of the bill, and is reasonable, probable and uncontradicted.

It would seem then that under the case, upon which the learned counsel so confidently rely, that affiants are not barred by the statute of limitations unless they have been guilty of such gross laches as will not excuse their failure to discover the fraud at an earlier date. This question will be discussed later.

In the case cited, the court find that the complainants had been guilty of such laches. The complainant was a corporation of the State in which the land was situated, and knew of its claim and ownership from the beginning, and was cognizant of the wrongful conduct of the defendant.

As said by the Court:

"Every step taken by the defendant was, of necessity, made openly and above board. The lands were selected as indemnity lands, belonging to the defendant, and the Governor of the State asked in due form that they be so certified. They were certified to the State and by the State were deeded to the defendant. These deeds were entered of record in the counties wherein the lands are situated, and, in fact every step taken in procuring the same was made part of the public

records of the Federal and State Land Departments, which were open to the scrutiny of the public. The means of knowledge on part of the complainant were too open and available for it to be credible that the company allowed a period of seventeen years to elapse after the date of the grant under which it claims, and four years after it had earned all it could under the grant, before any inquiry touching these lands was made in the interest of the company, and even the slightest inquiry or examination would have disclosed the fact that the State and United States authorities had selected and conveyed these lands to the defendant company, deeming that company to be entitled thereto."

The case cited could not have been otherwise decided. It differs from the case at bar *in toto coelo.*

The relation of co-tenantcy existed amongst the parties to this suit and those under whom they claim. This prevented the statute of limitations from running.

Taylor acquired a one-sixth interest by his purchase, namely, the interest of the widow Elizabeth Remsen. He thereby became a tenant in common with the minor children, who owned the equitable title to the other five-sixths. By acquiring the legal title he became also their trustee. The possession of a co-tenant is the possession of all and there can be no adverse possession until after what is equivalent to an actual ouster, or an exclusive possession of over twenty years. There can be no ouster without notice.

All who entered under Taylor stepped into his shoes and became co tenants as to the equitable title and trustees as to the legal title of the minor children and their heirs at law.

The possession therefore of the defendants was not adverse to their co-tenants, for there has been no actual ouster with notice, and such possession, if adverse, has not continued long enough to ripen into title.

Clymer et al. v. *Dawkins et al*, 3 How., 674, decides that,

"The entry and possession of one tenant in common is ordinarily deemed the entry and possession of all the tenants; and this presumption will prevail in favor of all, until some notorious act of ouster or adverse possession by the party so entering is brought home to the knowledge or notice of the others. When this occurs, the possession is from that period treated as adverse to the other tenants. Such a notorious ouster or adverse possession may be by any overt act *in pais* by one tenant, of which the other tenants have due notice, or the assertion in any proceeding at law of a several and distinct claim ro title."

"The seisin and possession of one tenant in common of real estate is seisin and possession for the use of the others."

Kinney *v.* Slattery, 51 Iowa, 353.

Burns *v.* Bryne, 45 *id.*, 285.

Campbell *v.* Campbell, 13 N. H., 483.
Day *v.* Howard, 73 N. C., 1.
Bowen *v.* Preston, 48 Ind., 367.
Foulke *v.* Bond, 12 Vr. (N. J.), 527.
Covington *v.* Stewart, 77 N. C., 148.
Miller *v.* Myers, 46 Cal., 535.
Challefoux *v.* Ducharme, 8 Wis., 287.
Mining Co. *v.* Taylor, 100 U. S., 37.
Humbert *v.* Trinity Church, 24 Wend. (N. Y.), 587.
Phillips *v.* Cregg, 10 Watts (Pa.), 158.
Young *v.* DeBruhl, 11 Rich. (L. S. C.), 638.
Vaughn *v.* Bacon, 15 Me., 455.
Campan *v.* Campan, 44 Mich., 31.
Lillianskyoldt *v.* Goss, 2 Utah T., 292.
Fairclaim *v.* Shockleton, 5 Burr., 2604.
Ford *v.* Grey, Salk, 285.

One tenant in common may oust his co-tenant and hold in severalty, but no adverse possession can be construed against him until notice is brought home to him of such ouster.

Barr *v.* Gratz, 4 Wheat., 213.
McClung *v.* Ross, 5 Wheat., 116.
Clymer *v.* Dawkins, 3 How., 674.
Zellers *v.* Eckert, 4 How., 289.

XI.

THE COMPLAINANTS' RIGHT TO RELIEF IS NOT BARRED BY LACHES OR ACQUIESCENCE.

As to laches the facts are, briefly: Harriet A. Meyer, one of the minor heirs of George W. Remsen, was born in 1831, and was seventeen years old when the land warrant was issued and sold. She was then a married woman, and is now the wife of Van Zaudt, having married the second time before 1889. She was fifty-eight years old in 1889, when Hendrickson visited Philadelphia. Mary Ann Remsen, one of the minor heirs, was born August 12, 1835, was therefore thirteen yeers old when the land warrant was issued and sold. She died June 12, 1882, and left surviving two married daughters, the plaintiffs. Emma F. Hergesheimer and Maggie L. Heckmen. John Wesley Remsen, one of the minor heirs of George W., was born November 8, 1837, and was hence under eleven years of age when

the land warrant was issued and sold. He died on the 11th of October, 1862, unmarried, without issue, and his interest then descended, under the Minnesota statutes, in equal shares to the mother and brothers and sisters. (Ch. 37, sec. 1, subd. 3, Statutes of Minnesota, 1849–1858.) George W. Remsen, Jr., one of the minor heirs, was born September 8, 1842, and was six years old when the land warrant was sold. He died in 1878, leaving the plaintiffs Mary J. Remsen, his widow, Geo. W. A., his son, Clara B. and Mabel, his daughters. Geo. W. A. was born July 2, 1866, and was twenty-three years old when Hendrickson went to Philadelphia, in December, 1889. Clara B. was born July 3, 1868, and was twenty-one years old at that time. Mabel was a minor, being twenty-one years old when called as a witness. This was in December, 1892, so she must have been eighteen at the time of Hendrickson's visit.

These plaintiffs, as well as their ancestors, heirs of the soldier, Geo. W., were all poor and ignorant people, as their evidence shows. They had lived in Pennsylvania, Maryland and New Jersey, scattered and separated from each other. The four minor children of George W., ranging in age from six to thirteen years, in 1848, when this land warrant was issued and sold, knew their father to have been a soldier, and that he died in Mexico. We may safely concede, for the argument sake, that all of them knew this either in 1848 or soon after; but none of them knew of the existence of the act of Congress of February 11, 1847; none of them knew that their father was entitled to a land warrant under the law; none of them knew it had ever issued, or that it had been sold by their mother; none of them had the slightest knowledge beyond, at most, that their father had died a soldier in the Mexican war, until December, 1889, except *possibly* Harriet A. Van Zandt, who accompanied her mother to the lawyer's office and who signed a paper, the character of which she says she did not know. Clara A. Remsen, who was born in July, 1868, testified that in 1891 she had heard her mother speak about the land and the claim of the heirs, but it was some time in 1890, which was after Hendrickson's visit to Philadelphia. She had never heard of it before. It is incorrect, as stated in the defendant's printed argument, that James W. Hopkins testified that "it was reported among the family that he had a land warrant and sold it, and that it was generally known among the children."

His testimony was as follows:

"Q. It was reported generally amongst the family that she had a land warrant and sold it?

A. Yes, sir.

Q. And generally known among the children?
A. I knew it.
Q. And it was generally known among the family?
A. I may say here that my father sold his about the same time. He was a soldier in the war of 1812.
Q. You say it was generally known among the family that she sold the land warrant?
A. Yes, I guess it was. I know I knew it. General Small sold it for her.
Q. And Harriett knew it I suppose?
A. I suppose she did.
Q. You have heard her speak about it, haven't you?
A. No; I have never heard the children speak about it, they were too young.
Q. I mean in after years?
A. No; I never heard of it. I believe she sold the land warrant to try and raise the children.

* * * * * * *

Q. When did you first hear about this claim for this land out West?
A. Well, I paid no attention to it. I think it has been probably two years ago. My sister, Mrs. Remsen, told me somebody called to see her about it, hunting up the heirs of George W. Remsen.
Q. About the time she told you of this, it was talked up among the heirs, was it that there was a claim out West?
A. So far as that is concerned I will tell you that there is not much visiting amongst those children at my house.
Q. Did you see them?
A. No; I scarcely ever see them.

* * * * * * *

Q. You don't mean to say that you ever had any conversation with any of the children in reference to this matter?
A. No.

* * * * * * *

Q. *Prior to this, had you ever heard the children speak of knowing that their father was entitled to any land?*
A. *No sir; never.*"

Printed record, pp. 129, 130, 131, 132.

From December, 1889, to the commencement of this suit, May, 1892, two years and five months, the facts are agreed to and shown by two stipulations. (Record pp. 197, 198.) Briefly these facts are: In December, 1889, one Hendrickson, who lived in St. Paul, went to Philadelphia and got Mr. Mayne, now one of the plaintiffs' solicitors to this suit, to assist him in hunting up the Remsen heirs. After they found them the heirs were informed that a land warrant had been issued and sold, that there was some question of the validity of

the transfer, and a chance to claim the land; they proposed that the heirs should give them a power of attorney; this the heirs declined to do without knowing more of the facts; Mr. Hendrickson and Mr. Mayne declined to tell the heirs where the land in question was or its value. Until then the heirs never knew that they or their father had or ever had had any claim to land or a land warrant in Minnesota or anywhere else. In May, 1890, their refusal became final and this negotiation was broken off. Between that time and August, 1891, the heirs did nothing. And this is the only time during which they can be charged with any delay. This delay was not over a year at most: Considering their ignorance, the tender age of three of them, their scattered residences, it was certainly not an unreasonable delay. They had no knowledge of the facts except from Hendrickson, whom they did not know, and who said that there was some question about the validity of the sale of a land warrant, and that they had some chance to claim some land. To this rumor coming from a stranger they were not called upon to give any great attention. They were not called on to employ counsel and institute an investigation of possible land claims. The stipulations shows that after this time but few transfers or mortgages were made affecting a very small part of the premises in suit. So for the most part the status of the title did not change from this time on, and no one suffered prejudice by the short time which elapsed between that time and the institution of this suit.

After this Mr. Mayne, never having been attorney of any of the plaintiffs, investigated the facts on his own account. In August, 1891, he got the plaintiffs together and informed them fully. This resulted in *immediate* preparation for this suit. We are satisfied that no prejudicial delay occurred after that time.

"Laches is the neglect to do something which by law a man is obliged to do."

Sebag *v.* Abitbol, 4 Maule & S., 463.
Anderson Law Dict., 593.

"It implies, however, a knowledge of one's rights."

Massie *v.* Heiskell, 80 Va., 805.

"The granting or refusing relief in equity on the ground of laches in applying for it must depend upon the special circumstances of each case."

Bryan *v.* Kales, 134 U. S., 126.

"Whether laches is to be imputed to a party seeking the aid of a court of equity depends upon the circumstances of the particular case."

Griswold *v.* Hazard, 141 U. S., 260.

"The question of laches does not depend upon the fact that a certain definite time has elapsed since the cause of action accrued, but upon whether, under all the circumstances of the particular case, the plaintiff is chargeable with a want of due diligence in failing to institute proceedings earlier."

Townsend *v.* Vanderwerker, 160 U. S., 171.

"Length of time alone is not the test of the staleness of a demand but the question must be determined by the facts and circumstances of each case and according to right and justice."

Marcotte *v.* Hartman, 48 N. Y., 767.

"When a party has equitable rights a court will not refuse relief, although the claim has been outstanding for a long time, if the reason for delay is such as not to defeat the party's right to its enforcement upon the ground of laches or acquiescence."

Lunn v. Johnson, 3 Ired. (N. C.) Eq., 70.
Mason v. Crosby, 1 Davies (U. S. C. C.), 303.
Kimball v. Ives, 17 Vt., 430.
Bancroft v. Andrews, 6 Cush. (Mass.), 493.
Wood on Limitations, ch. VI, sec. 60, page 151.

"It is a rule founded in justice and reason that equity will not refuse relief where there has been a reasonable excuse for the delay."

Wood on Limitations of Actions, ed. 1883, sec. 60, page 124.
Bell v. Hudson, 2 Am. St. Rep., 805.

"The fact that a party has delayed the enforcement of his right for the statutory period is *prima facie* evidence, but even this is not decisive, as, if there is a sufficient cause for delay, the Court will enforce the right."

Preston *v.* Preston, 95 U. S., 200.
Neeley's Appeal, 85 Penn. St., 387.
Reed *v.* West, 47 Texas, 240.
Rogan *v.* Walker, 1 Wis., 631.
Lawrence *v.* Rokes, 61 Me., 38.
McKnight *v.* Taylor, 1 How. (U. S.), 161.
Wood on Limitations, ch. VI, sec. 60, page 148.

"The poverty of the vendor, added to the other circumstances, is also a material ingredient in such a case."

Bell *v.* Hudson, 2 Am. St. Rep., 806.

"Absence of complainant from the State, and late discovery of the fraud, are excuses for delay."

Hallett *v.* Collins, 10 How., 174.

In *Scherer* v. *Ingeerman*, 110 Ind., 428, it is decided, that

"It is only where the laches of a party are of such a character as to work an equitable estoppel that his right of action will be limited to a less period than that fixed by the statutes of limitations."

"There may be cases of statutory proceedings, or cases of purely equitable cognizance, where the laches of a party may be of such a character and under such circumstances as will bar his right to prosecute his action, in less time than that fixed by the statute of limitations. *But that is only in cases where the laches are of such a character and under such circumstances as to work an equitable estoppel.*"

State *ex rel. v.* Gordon, 87 Ind., 117.

City of Logansport *v.* ———, 99 Ind., 531 (50 Am. R. 109).

Earle *v.* Earle, 91 Ind., 27.

"Where the question of laches is in issue, the plaintiff is chargeable with such knowledge as he might have obtained upon inquiry, provided the *facts already known* by him were such as to put upon a man of ordinary intelligence the duty of inquiry."

Johnston *v.* Standard Min. Co., 148 U. S., 360.

"There can be no laches in failing to assert the rights of which a party is *wholly ignorant*, and whose existence he had no reason to apprehend."

Halstead *v.* Grinnan, 152 U. S., 412.

"Parties ignorant of their rights cannot be charged with laches."

Hannon v. Hounihan, 85 Va., 429.

"Acquiescence imports full knowledge: *Life Assn. of Scotland* v. *Siddal*, 4 De. Gex. F. & J., 74. Therefore a party will not be held to *acquiesce* in acts which he did not know he had any right to dispute."

Cholmondeley v. Clinton, 2 Mer., 171, 362.

"Nor is the rule confined to cases of acquiescence merely; for it is

said that where one is ignorant of the facts, there can be neither laches nor acquiescence."

Charter v. Travelyn, 11 Clark & F., 714, 740.
Bennett v. Colley, 1 Mylne & K., 225, 232.
Wood on Limitations of Actions, ed. 1883, sec. 61, p. 125.

"Where fraud is relied on in cases of trust, there can be no laches by reason of anything done or neglected, where the party seeking relief has, without any fault of his own, remained in ignorance of his rights."

Rolfe *v.* Gregory, 13 Week. Rep., 355.
Savery v. King, 5 H. L. Cas., 626, 665.

"In brief, time does not commence to run, except there is full information and knowledge by a party of his rights and the injury done, and he has such notice thereof as that he ought to have made inquiry, or where there is undue influence, and the disability is removed, or where he himself possesses the means of knowledge."

1 Sugden on Vendors, 8th Am. ed., Perkins' notes, 387, note p. 1.
Bell v. Hudson, 2 Am. St. Rep., 802.

"It is settled that mere delay does not constitute laches. There must be negligent delay at the least; there must be knowledge of the facts, or sufficient of the facts to call for further inquiry."

In order that the remedy should be lost by laches or delay, it is, if not universally, at all events ordinarily necessary, that there should be sufficient knowledge of the facts constituting the title to relief."

Lindsay Petroleum Co. v. Hurd, L. R., 5, P. C., 22.

In *Archibald* v. *Scully*, 9 H. L. C., 383, Lord Wensleydale said:

"So far as laches is a defense I take it that where there is a statute of limitation the objection of simple laches does not apply until the expiration of the time allowed by the statute. But acquiescence is a different thing; it means more than laches. If a party, who could object, lies by and knowingly permits another to incur an expense in doing an act under the belief that it would not be objected to, and so a kind of permission may be said to be given to another to alter his conditions, he may be said to acquiesce; but the fact of simply neglecting to enforce a claim for the period during which the law permits him to delay, without losing his right, I conceive cannot be an equitable bar. In this case I cannot say that anything has been done or permitted which falls under the definition of acquiescence."

"In order to bar the right to equitable relief the acquiescence must be with the knowledge of the wrongful acts themselves, and of their injurious consequences; it must be voluntary, not the result of acci-

dent, nor of causes rendering it a physical, legal, or moral necessity, and it must last for an unreasonable length of time, so that it will be inequitable even to the wrongdoer to enforce the peculiar remedies of equity against him, after he has been suffered to go on unmolested and his conduct apparently acquiesced in."

Pomeroy's Equity Jurisprudence, Vol. 2, page 280, sec. 817.

"Mere delay and acquiescence will not therefore defeat the remedy unless it has continued so long as to defeat the right itself. * * * Upon obtaining knowledge of the facts he should commence the proceedings for relief as soon as reasonably possible. Acquiescence, consisting of unnecessary delay after such knowledge, will defeat the equitable relief."

Pomeroy's Equity Jurisprudence, Vol. 2, page 281, sec. 817.

The following cases are cited by the respondents' counsel, as maintaining the position that the complainants' claim is barred by their laches:

Russell v. *Transylvania University*, 1 Wheat., 432, was a suit, the object of which was to obtain a conveyance from the defendants of a certain tract of land. The question of laches or of acquiescence is not mentioned.

Elmendorf v. *Taylor*, 10 Wheat, 152. This case decides, "That although the statutes of limitations do not apply, in terms, to courts of equity, yet the period of limitation which takes away a right of entry, or an action of ejectment, has been held, by analogy, to bar relief in equity, even where the period of limitation for a writ of right, or other real action, had not expired. Where an adverse possession has continued for twenty years, it constitutes a complete bar in equity, wherever an ejectment would be barred, if the plaintiff possessed a legal title."

In the case at bar the possession has not been sufficiently long, even if adverse, to bar the complainants had they sued in ejectment upon the legal title, except as to the right-of-way across the property which was conveyed to the Minnesota and Pacific R. R. Co. July 19, 1858, and occupied by it in 1862,—this suit being commenced on May 3, 1894. Besides there was no excuse offered for the delay in the Elmendorf case.

McKnight v. *Taylor*, 1 How., 161. This case decides that "There must be conscience, good faith, and reasonable diligence to call into action the powers of a court of equity. In matters of account, where they are not barred by the statute of limitations, courts of equity refuse to interfere, after a considerable lapse of time, from considerations of public policy, and from the difficulty of doing entire justice,

when the original transactions have become obscure by time, and the evidence may be lost."

In this case, there was an unexplained delay of nineteen years and three months. It is plainly distinguishable from the case at bar.

In *Wagner* v. *Baird*, 7 How. 234, 258, Mr. Justice Grier says:

"In cases of concurrent jurisdiction, courts of equity consider themselves bound by the statutes of limitation which govern courts of law in like cases; and this rather in obedience to the statutes than by analogy. In many other cases they act upon the analogy of the limitations at law; as where a legal title would in ejectment be barred by twenty years' adverse possession, courts of equity will act upon the like limitation, and apply it to all cases of relief sought upon equitable titles, or claims touching real estate."

It was not pretended that the *cestuis que trust* were ignorant of the transaction upon which their equity was based, and no excuse whatever is given for a delay of forty years. The court says: "They have shown nothing to mitigate the effect of their laches and long acquiescence." Distinguishable.

In *U. S.* v. *Moore*, 12 How., 209, 222, Mr. Justice Catron says:

"The party was under no disability, and slept on his rights as he now claims them, for nearly fifty years, without taking a single step. He makes no excuse for his long delay, and cannot now get relief by having his title completed." Distinguishable.

Badger v. *Badger*, 2 Wall, 87, was a case in which an administrator fraudulently purchased property of his intestate for himself. The bill was dismissed, because there was no excuse for the complainant's laches for twenty-eight years, set up in the bill and proven by the evidence. Distinguishable.

In *Harwood* v. *R. R. Co.* 17, Wall, 78, it was decided that where a bill is filed by a third party to set aside as fraudulent completed judicial proceedings, regular on their face, the plaintiff in those proceedings should be brought in as a party.

Where such a bill is filed five years after the judicial proceedings, which it is sought to set aside, have been completed, the cause of so considerable a delay should be specifically set out. And if ignorance of the frauds is relied on to excuse the delay, it should be shown specifically when knowledge of the fraud was first obtained, and why it was not sooner obtained. Distinguishable. These facts are fully set forth in the bill in the present case.

In *Hume* v. *Beale*, 17 Wall, 336, the rule of equity was applied, that if a *cestui que trust*, after being *sui juris* has, with full knowledge of a breach of trust, for a long time acquiesced in it, equity will not relieve him. Distinguishable.

McQuiddy v. *Ware*, 20 Wall, 14, decides that—

"A man who has neglected his private affairs and gone away from his home and State, for the purpose of devoting his time to the cause of rebellion against the Government, cannot come into equity to complain that his creditors have obtained payment of admitted debts through judicial process obtained upon constructive notice, and on a supposition wrongly made by them that he had no home in the State or none that they knew of. Especially is this true when there is no allegation of want of actual knowledge of what they were doing."

This case has no application to the case at bar.

Marsh v. *Whitmore*, 21 Wall, 178, decides—

"Where an attorney sold bonds of a client at public sale, and bought them in himself, at their full value at the time, and the client was aware of the purchase and acquiesced in it for twelve years, it is then too late for the client to attempt to impeach the validity of the sale." Distinguishable.

In case of Broderick's will, 21 Wall, 503, it was decided that,

"Ignorance of a fraud committed, which is the ordinary excuse for delay, does not apply in such a case, especially when it is alleged that the circumstances of the fraud were publicly and generally known at the domicile of the testator shortly after his death."

It is not pretended that there was any publicity given to the sale of the land warrant. And if there had been, it would not have reached the children of tender years, whose rights were affected.

Brown v. County of Buena Vista, 95 U. S., 157, decides that,

"A court of equity will not relieve against a judgment at law where the party seeking its aid has been guilty of laches or fault. Whether the time which has elapsed since the discovery of the fraud, set up as the ground of relief, be sufficient to bar the remedy, is a question to be determined by the sound discretion of the courts."

This is admitted. It has no application.

In *Hayward v. National Bank*, 96 U. S., 611,

"A. borrowed of a bank money on call, and deposited with it as collateral security certain mining stocks, with written authority to sell them at its discretion. The loan remaining unpaid, the bank notified him that, unless he paid it, the stocks would be sold. He failed, after repeated demands, to pay it, and they were sold, for more than their market value, to three directors of the bank, and the proceeds applied to the payment of the loan. A, who was advised of the sale, and that enough had been realized to pay his indebtedness, made no objection. The stocks were transferred to the purchasers. Nearly four years after the sale, the stocks having in the meantime greatly increased in value, A. notified the bank of his desire and purpose to redeem them, and subsequently filed his bill against it, asserting his right so to redeem, and praying for general relief. *Held*, that he is entitled to no relief."

In this case the complainant had full knowledge of all the facts from the beginning. Distinguishable.

Godden v. Kimmell 99 U. S., 201, decides that,

"In cases of concurrent jurisdiction, courts of equity consider themselves bound by the statutes of limitation which govern courts of law; in many other cases they act upon the analogy of the limitations at law; but even where there is no such statute governing the case, a defence founded upon the lapse of time and the staleness of the claim is available in equity where there has been gross laches in prosecuting the claim, or long acxuiescence in the assertion of adverse rights."

In this case facts were known by the complainant for many years, and no excuse for this delay is set up or shown. Distinguishable.

Wood v. *Carpenter*, 101 U. S., 135, was decided against the plaintiff, because, among other things, he knew, or might with ordinary care and attention have known, the facts upon which he asked relief. Distinguishable.

Holgate v. *Eaton*, 116 U. S., 33, decides, that

"A married woman, who on being informed of a contract made by her husband for the sale of an equitable interest in real estate held by her in her own right, repudiates it, and who, for more than two years, refuses to perform it whenever thereto requested, during which time the property depreciates greatly in value, cannot, after the expiration of that time, enforce in equity the specific performance of the contract by the other party."

Here there was the positive act of the complainant, which amounted to an estoppel upon her.

Speidel v. *Henrici*, 120 U. S., 377, decides that

"The general rule that express trusts are not within the statute of limitations does not apply to a trust openly disavowed by the trustee with the knowledge of the *cestui que trust.* A court of equity will not assist one who has slept upon his rights, and shows no excuse for his laches in asserting them."

Here there was an unexplained delay in suing, for more than fifty years. In the case at bar there was not the unequivocal adverse possession during the period required by the statute of limitations, nor was there any disavowal on the part of the trustee brought home to the *cestui que trust.*

Fletcher v. *Fuller*, 120 U. S., 534, was an action of ejectment, in which the question of laches did not arise.

In *Richards* v. *McCall*, 124 U. S., 183, it was decided that

"When a complainant in a bill in equity has been guilty of apparent laches, in commencing his suit, his bill should set forth the impediments to an earlier prosecution, the cause of his ignorance of his rights,

and when the knowledge of them came to him; and if it appears at the hearing that the case is liable to the objection of laches on his part, relief will be refused on that ground."

Distinguishable.

In *Richards* v. *McCall*, 124 U. S., 183, 189, Mr. Justice Harlan says:

"We find nothing whatever in the record to excuse the failure of the appellee to institute legal proceedings in due time, to have the sale set aside. He knew that the appellant relied upon the sale, and upon the face of it expended large sums. He knew that the premises here in dispute were in fact levied on for his debts, and were intended to be sold in satisfaction of those debts. But after the property has largely increased in value, and after sleeping upon his rights for nearly twelve years, with information, during the whole of that period, of every fact now relied upon by him, appellee asks aid of a court of equity to set aside the sale and conveyance and adjudge him to be the owner of the property."

Distinguishable.

In *Mackall* v *Casalier*, 137 U. S., 566, it is decided that

"Negotiations for settlement of a disputed matter, which one party hopes may result in a settlement and adjustment, do not operate to bar in equity the defense of laches, when the other party gives no encouragement to such hopes, never promises a settlement, never concedes that his own claims are doubtful, and never recognizes the others' claims."

No sufficient excuse was shown for the delay of nineteen years in bringing suit by the complainant, who was aware of all of the facts from the beginning. Distinguishable.

In *Boone* v. *Burlington, etc., R. R.*, 139 U. S., 692, the complainant had full knowledge of all the facts constituting his cause of action from the beginning, and it was held that he was barred by the statute of limitations and by laches.

In *Foster* v. *Mansfield, etc., R. R. Co.*, 146 U. S., 88, it was decided that

"If a bill to set aside a foreclosure sale of a railroad under a mortgage on the ground of fraud and collusion, be not filed until ten years after the sale, a presumption of laches arises, which it is incumbent on the plaintiff to rebut. No negligence is imputable in such case to a person *who is ignorant of his interest* in the property which is the subject of the alleged fraud; but if he is aware of his interest, and knows that proceedings are pending, the result of which may be prejudicial to them, he is bound to look into such proceedings so far as to see that no action is taken to his detriment."

Distinguishable.

In *Johnson* v. *Standard Mining Co.*, 148 U. S., 360, it is decided that

"Where a question of laches is in issue the plaintiff is chargeable with such knowledge as he might have obtained upon inquiry, *provided the facts already known to him were such* as to put the duty of inquiry upon a man of ordinary intelligence."

In this case the complainant had a knowledge of facts which should have put him upon inquiry and stimulated him to activity in asserting his rights. In the case at bar the complainants, except perhaps Elizabeth Wetzel, were thoroughly ignorant of every fact upon which their claim is based until within a short time before the institution of this suit.

United States v. *Flint*, 4 Sawyer, 42, was a suit to vacate certain patents by the United States upon confirmed Mexican claims, on the ground that said claims were not genuine and that their confirmation was procured by fraud on the part of the complainants. The suits were brought after a delay of eighteen years, for which no excuse was offered. The case is plainly distinguishable from the one at bar.

In *Speidel* v. *Henrici*, 15 Fed. Rep., 753, it was held that where a trustee of a valid express trust denied the right of the *cestui que trust* and his relation to the latter in respect to the trust property become adverse from that time the right of the *cestui que trust* to relief was subject to the operation of the law of laches and that an unexplained delay of seventeen years will bar the claim.

In *United States* v. *Beebee*, 17 Fed. Rep., 36, it was held to be a rule in equity that lapse of time may constitute a sufficient defense even in the absence of statutory limitations and without necessary reference to any question of laches. The suit was brought to cancel certain land patents on the ground that they were obtained forty-three years prior thereto by fraud, many of the alleged facts concerning which transpired more than sixty years before the filing of the bill. There was no explanation of the delay, so that it was a plain case of laches, the land in question having been held in adverse possession during the whole period. It is difficult to imagine a stronger case of laches.

In *Leavenworth* v *Chicago, etc. Railway Co.*, 18 Fed. Rep., 209, it is decided:

"That to take advantage of the exception provided for, in a case of concealed fraud where otherwise the party would be barred by reason of his laches of the statute of limitations, it must be made clear that the fraudulent transaction, from which relief is prayed, was one which concealed itself, or at least the allegations and proof must be such as to satisfy the court that the complainants could not have known of the facts constituting the fraud by the exercise of the proper diligence and care. Whatever is sufficient to excite attention and put the party on his guard and call for inquiry is no-

tice of every thing to which this inquiry would have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant."

Distinguishable.

Fakir v. *Houck*, 36 Fed. Rep., 403, was a bill to redeem realty from a deed of trust executed in September, 1876. The bill was filed in 1888 with the knowledge of the facts. During all this while he took no steps to assert his right. The court very properly held that he was guilty of laches and that his claim was stale.

In *Naddo* v. *Bardon*, 51 Fed. Rep., 403: "The plaintiff sued to recover land formerly owned by him and claimed by defendants under an execution sale, recorded deeds executed by his attorney in fact, and tax titles. Plaintiff alleged that the judgment was void, and that the other transfers were avoided by fraud on the part of the attorney. The suit was brought seventeen years after the execution sale and the deeds of the attorney, and thirteen years after the tax titles were recorded. To excuse his delay, he alleged that for ten or twelve years he had lived in Canada, and that 'until recently he had not learned of the extent to which the transfers' sought to be avoided had been made; that for about ten years he had known that the attorney and others claimed that he had lost all rights in the land, but until recently he had been too poor to enforce his rights. It was held that he was guilty of laches, which the allegations of the bill were not sufficient to excuse."

This case is distinguishable.

In *Red River & Lake of the Woods Railroad Co.* v. *Sture*, 32 Minn., 95, it was decided that

"A settler who has entered public land of the United States under the provisions of the homestead law, although no patent has been issued, has an *inchoate* title to the land, which is property. This is a vested right which can only be defeated by his own failure to comply with the conditions of the law. If he complies with these conditions, he becomes invested with full ownership, and the absolute right to a patent. Under the Act of May 14, 1880, his right relates back to the date of his settlement."

This case has no bearing upon the case at bar.

In *McKinney* v. *Bode*, 33 Minn., 450, seven years before the patent issued, the plaintiff abandoned the land and gave up the design of becoming entitled to a patent. Others, by performing its conditions, kept it alive for themselves. After the patent was earned and issued, the plaintiff sought to appropriate the benefit of what was done by those who earned it. The Court held that this was inequitable and refused him relief. The case is easily dintinguishable.

In *Lang* v. *Morey*, 40 Minn., 396, it was decided that,

"A person making an entry under the homestead laws of the

United States may execute a valid mortgage upon land so entered, prior to submitting final proof and receiving the final certificate."

This case has no relation to the case at bar.

In *Murphy* v. *Burke*, 47 Minn., 99, it is decided that

"After abandonment, and an utter neglect for more than 10 years, and until patents issued to another, to comply with the conditions of the certificates, the equity of the holder of the certificates to the patents is not superior to that of one who, under a void tax sale of the lands, complies with the requirements of the certificates and of the law, and receives the patents."

This case has no bearing for that the original claimant had full notice of all the facts from the first. The case is one of equitable estoppel.

In *Peabody* v. *Flint*, 6 Allen, 52, it was held that

"A minority of the stockholders of a corporation may maintain a bill in equity in behalf of themselves and the other stockholders, for conspiracy and fraud, whereby their interests have been sacrificed, against the corporation and its officers and others who participate therein. By unreasonable delay, however, in bringing their bill, they will forfeit their title to equitable relief."

The plaintiffs had full notice of the facts upon which they based their prayer for relief from the beginning, but failed to offer any excuse for their delay.

In *Learned* v. *Foster*, 117 Mass., 365,

"The plaintiff attempted to avoid the foreclosure of a mortgage under a power of sale on the ground that the real purchasers at the sale were the owners of the equitable interest. He had constructive knowledge of the sale which took place thirteen years before the filing of this bill."

He offered no excuse for this delay, and the court held he was guilty of laches and acquiescence.

In *Evans* v. *Bowen and others*, 99 Mass., 213, it is decided that

"A bill in equity to amend a decree obtained in fraud of the plaintiff ought ordinarily, by analogy with the period fixed by statute for the suing out of writs of review as of right, or the filing of petitions for review of judgments in civil actions, to be filed within one year from his discovery of the fraud."

Distinguishable.

In *Campan* v. *Van Dyke*, 15 Mich., 371, at page 378, Mr. Justice Christiancy said:

"For these reasons, we think, in a case like the present, a party seeking to set aside the decree must satisfy the court that he has not slept upon his rights, and that his delay for any period after he was aware of his right, and competent to prosecute them, has not opera-

ted to the prejudice of the other parties, nor deprived them of any of the evidence or other means for sustaining the decree, which they might have possessed had he brought his bill at as early a period as he might. In other words, we think the only just rule which can be laid down upon this point is, that such a bill must be brought within *a reasonable time;* having reference to the *nature* and *all the circumstances of the particular case.*"

Distinguishable.

Wilbur v. *Flood*, 16 Mich., 41, decides that

"Where land has been conveyed in exchange for personal property, and the grantee seeks to repudiate the bargain for fraud, he cannot reclaim his goods without tending a reconveyance. And a mere offer to "*trade back*," without such conveyance or tender, is no rescission. Any unnecessary delay to rescind such a contract will cut off the right of the party complaining of the fraud; and in the present case a delay of fifteen months was held unreasonable."

Distinguishable.

In *Hubbardston Lumber Company* v. *Bates*, 31 Mich., 158, it is decided that

"If the plaintiffs could have rescinded at all they could only do so within a reasonable time; and in the absence of any evidence excusing it, a delay and acquiescence, with full knowledge of the facts, of between four and five months, is longer than could reasonably be required to exercise the right of rescision."

Distinguishable.

In *Tollansbe* v. *Kilbreth*, 17 Ill., 522, it was held that

"A court of equity will not permit a *cestui que trust* to show a speculative disposition toward his trustee. If a *cestui que trust* discovers facts which would give him a right to repudiate the acts of his trustee, and has investigated them, or had a reasonable time to do so, he is bound to declare whether he will avail himself of the right or not, and cannot lie by in a position to affirm the bargain, if a profitable one, and repudiate it if unprofitable."

Distinguishable.

In *Bank of Liverpool* v. *Grand Junction Ry. Co.*, 125 Mass., 491:

The plaintiff filed a bill to reach and apply a certain sum of money in possession of the defendant corporation in payment of a debt due from it to him upon the grouud of fraud committed seven years before the filing of the bill. The complainant was acquainted with the facts from the beginning. The court held that the party was guilty of laches, and dismissed the bill.

Distinguishable.

In *Kane* v. *Bloodgood*, 7 Johnson's Ch, 90, it was decided that,

"As long as there is a continuing and subsisting trust, acknowledged or acted on by the parties, the statute does not apply; but if

the trustee denies the right of his *cestui que trust*, and *the possession* of the property becomes *adverse*, lapse of time, from that period, may constitute a bar in equity."

Distinguishable.

Ashurst's Appeal, 60 Pa. St., 290, was a suit to adjudge the defendant a trustee, and for an accounting. There was an *unexplained* delay of eight years on the part or the plaintiff. The bill was dismissed. The court holding that,

"An attempt to fasten *a constructive trust* on a purchaser must fail unless made within a reasonable time. Acquiescence is presumed from delay. If a trustee to sell becomes the purchaser, the purchase is generally voidable, but the *cestui que trust* must move in a reasonable time.

Distinguishable.

In Evans's appeal, 81 Pa. St. Rep., 278, it is decided that

"As a general rule a constructive trust as to personal rights may be asserted at any time within six years after the knowledge of the facts creating it.

Such trust is barred after six years, but laches for a shorter period, aided by other circumstances, will bar the right."

Distinguishable.

The case of *Felix* v. *Patrick*, 145 U. S., 317, is cited by the defendants, and relied upon as decisive of the case at bar.

In this case Sophia Felix, an Indian half-breed, the wife of David Garnelle, was under the act of Congress of July 17, 1854, entitled to and received, certain scrip for 480 acres locatable upon any unoccupied land of the Government. By express provision of the said statute no transfer or conveyance of such scrip was valid. Some person obtained possession of this scrip, to the amount of 120 acres, from her and her husband, and took from them a power of attorney and a quit-claim deed, both bearing date March 31, 1860, and executed in blank, omitting the name of the grantee and the description of the land. The power of attorney authorized the person, whose name was to be inserted, to sell and convey and confirm unto the purchaser thereof the following described pieces or parcels of land "*to be located* for us and in our names."

Two years afterwards, the power of attorney and quit-claim deed were turned over by someone to Matthewson T. Patrick, who located the scrip in the name of Sophia Felix upon what is now a part of the city of Omaha. He thereupon caused the power of attorney to be filled out with a description of the scrip and of the property located with it, and caused the name of William Ruth to be inserted as the attorney to sell and convey the property, a description of which

was also inserted. He also caused the quit-claim deed to be filled out with a description of the property, and inserted his own name as grantee, making the instrument purport to be a conveyance by Sophia and David Garnelle to himself. On September 7, 1863, he caused the said power of attorney and quit-claim deed to be filed for record in the Recorder's office of Douglas County; and caused the said William Ruth to execute and deliver to him a deed of the property, by virtue of his pretended authority, and caused the same to be filed for record. The deeds and power of attorney were duly recorded. These instruments were, as said by the court, "palpable devises to evade the law against the assignment of the scrip."

Under the said Act of Congress of July 17, 1854, this scrip could not be sold or assigned before it was located directly, or indirectly. It plainly appeared from the public records, recorded in Douglas county, Nebraska, where the land was situated, that the land was sold by Sophia Felix two years before it was located, and therefore that the sale was void and inoperative, and all subsequent purchasers of the land were thus fixed with notice of the infirmity of their title.

Patrick took possession of the land before it was located, and he and those claiming under him were in continuous adverse possession thereof until 1887, when the heirs of Sophia Felix, who died in December, 1865, brought a suit in equity in the United States Circuit Court charging fraud in the transaction by which she parted with the scrip, and seeking to have Patrick declared a trustee as to all the lands that he has not disposed of, and to impose upon his grantees the same liability.

To avoid apparent laches in not instituting suit at an earlier day, the plaintiffs alleged that Sophia Felix and her heirs, being members of the Sioux Nation until 1887, when they became citizens of the United States, were incapable of suing in any of the courts of the United States, (*although the courts of Nebraska were open to them*); that cotemporaneously with their becoming citizens of the United States they discovered the fraud which had been practiced upon Sophia, (*although they failed to show how the fraud came to be discovered, and why it was not discovered before, and although she and her husband were fully aware she had owned the scrip in question and that she had parted with it in 1861, yet she lived till 1865 and her husband till 1882 without making any attempt to discover what had become of it, and her heirs made no effort to discover the fraud until 1887, when their intelligence seems to have suddenly spruny into activity upon their becoming citizens of the United States.*)

A large part of the tract had before the commencement of the suit been platted, divided into lots, and sold to purchasers.

The Court held, that upon these facts, Patrick originally took the lands as trustee for Felix, under a constructive trust created by operation of law, and that his possession from the beginning was adverse to hers. That, knowing the fact that she had owned the scrip and had parted with it, Sophia and her husband ought to have made some inquiry about it. That Felix was bound to use reasonable diligence in discovering the fraud and seeking redress, and that the bill was fatally defective in not setting forth when and how the alleged fraud was discovered, in order that the Court might clearly see whether it could not have been discovered before.

The Court lays stress upon the fact that Sophia Felix must have known that she owned the scrip in 1861, and that she had then parted with some of it, and observes that no reason or excuse is suggested why, having this knowledge, she did not make inquiry about it at an earlier day. The fact that she was under tribal disabilities so far as the Federal Courts were concerned, did not prevent her from resorting the Courts of Nebraska. The plaintiffs fail in their bill to show when the facts upon which the relief is based were discovered, and why they were not discovered before. Besides, the Court doubts whether Patrick did not sell the land for a fair price and criticizes the general averment of fraud as to the manner in which the scrip was obtained from her. She and her husband being dead and the party who procured the scrip from her being unknown, stress is put upon the fact that the property had largely increased in value.

Felix v. *Patrick* is distinguishable from the case in hand, in several important particulars:

First. While Felix was apprised of her former ownership of the land scrip, and knew that she had parted with it through fraud or otherwise, the Remsen heirs, if human testimony is to be believed, were absolutely ignorant of the fact that they or their father were entitled under the law to any land scrip, or that any had ever been issued to them. While there was something to put Felix upon inquiry, there was absolutely nothing to start the Remsen heirs, until Hendrickson's visit to Philadelphia in December, 1889. There is no presumption that they knew of the statute of 1847, which gave to Mexican soldiers a land bounty, and they were not in moral or legal fault on account of this ignorance. No man can be guilty of laches

unless he is morally or legally to blame. The legal fiction, that every man is presumed to know the law is not applicable here.

The presumption of knowledge is rebuttable. The evidence which is positive and reasonable, and therefore credible, clearly proves the absence of knowledge. Thus the technical presumption, if any there be, is dissipated.

Fresh *v.* Gilson, 16 Pet., 327.
Provost *v.* Gratz, 6 Wheat., 481.
Lincoln *v.* French, 105 U. S., 614.

The only theory upon which blame for a failure to investigate can attach to the heirs, is that they had actual knowledge of their right to the land scrip before December, 1889.

The word laches, from its Latin *laxus*—loose, French *lache*—lax, slothful, is defined by Worcester to mean negligence, remissness, slackness.

Second. The court, in *Felix* v. *Patrick*, seriously questions whether Felix had not been paid full value for her scrip, and whether it was obtained from her by fraud, and calls attention to the fact, that both she and her husband are dead, and the party who procured the scrip from her is unknown, so that there has been a loss of evidence.

In the case at bar, there is no doubt but the land scrip of the minor heirs of George W. Remsen was sold and assigned by their guardian without authority of court, and contrary to the statute. The records of the court remain; they show no sign or vestige of an order of sale. Neither the files of the case, where the original order might be found, nor the docket where a record of it is always made, nor the index-book, where the order is indexed, after careful search, show that such an order ever existed. Had an order of this character been made, without doubt it would have been recited in the patent, and the absence of this recital is confirmatory evidence of the non-existence of the order. Upon this record evidence, unchanged and unchangeable, rests the plaintiffs' case. The death of witnesses cannot add to, or detract from, its conclusive character.

There is no pretence that the minor children received one penny for their interest. If their guardian, contrary to the statute, received its full value, the children and their heirs are not in any manner bound thereby either in a court of law or chancery.

Third. The Felix case was decided upon demurrer, and the court, in sustaining the demurrer, declares, that the bill of complaint is

fatally defective in its failure to make distinct averments as to the time when the fraud was discovered, and what the discovery was, in order that the court might clearly see whether, by ordinary diligence, the discovery might not have been made before.

In the case at bar, the bill of complaint is particular and definite upon this point. It shows the infancy and tender age of the children of George W. Remsen when the land warrant in question was issued. It shows the appointment of a guardian for them, and the attempted assignment of their rights under this warrant, without the authority of the Orphans' Court and in defiance of the Federal statute forbidding it. It shows that these children were in absolute ignorance of the transaction, and in absolute ignorance of the existence of any land warrant which had been issued to them, and in absolute ignorance of their right to receive such land warrant or any land warrant whatever; and that not until August in the year 1891 did they acquire any knowledge or information whatever of the facts in this bill set forth. That in that year they received information by letters from parties in the State of Minnesota, which led them to investigate, employ counsel and institute this suit. The evidence fully supports the allegations of the bill, and is credible and convincing.

Fourth. In *Felix* v. *Patrick*, it appears that Patrick was in possession of the land at the time when the patent was issued on July 3, 1863, and that he and those claiming under him have been in the adverse possession thereof ever since, a possession which, down to the filing of the bill in 1887, was for twenty-four years.

In the present case it appears from the evidence, that no possession was taken by Taylor or his grantees, until in 1862, when the M. & P. R. R. Co. laid tracks upon its right of way across a portion of the land.

In 1881 the Minnesota Transfer Company commenced operations thereon by laying tracks upon its right of way, and since then, by putting up freight houses and stock yards thereon.

In 1885 the rest of the land was platted, and in the following years houses were erected thereon.

Except as above stated, no possession was taken of the tract. This suit was commenced on May 28, 1892. So, with the exception of the right of way of the M. & P. R. R. Co., the land has not been in the possession, hostile or friendly, of any one for the statutory period of fifteen years.

There is only one point of similarity between the two cases. In both of them, has the land appreciated in value. The Court in *Felix* v. *Patrick*, say:

"That the real question is whether equity demands that a party who, twenty-eight years ago, was unlawfully deprived of a certificate or muniment of title of the value of $150, shall now be put in the possession of property admitted to be worth over a million. The disproportion is so great that the conscience is startled, and the inquiry is at once suggested, whether it can be possible that the defendant has been guilty of fraud so gross as to involve consequences so disastrous. In a court of equity, at least, the punishment should not be disproportionate to the offence, and the very magnitude of the consequences in this case demands of us that we should consider carefully the nature of the wrong done by the defendant in acquiring the title to these lands."

Ordinarily, a party recovers upon the strength of his own title, and not upon the weakness of that of his adversary. If the Felix heirs were entitled to recover the property which was the subject of that suit, it was because they were the equitable owners of it. Their equitable title was not affected by the appreciation or depreciation of the property in the hands of the constructive trustee, and their recovery would be adjudged by a court of law or of equity, simply as an act of justice to them, not as a punishment for an offence or wrong done by the defendant. All that is required of a plaintiff in a suit in equity is to come into court with a good cause and with clean hands. In such case the court is obliged to restore to him the property to which he is entitled, without regard to the inconvenience which the wrongful holder may suffer by having to surrender it; and this is done, not as a punishment to the wrong-doer, but simply by way of restitution to the true owner. The right of the Felix heirs to have Patrick declared their trustee did not depend upon Patrick's actual or moral fraud. They had the right to have the constructive trust set up, and the constructive trustee decreed to reconvey, even though that trustee had acquired the property by an innocent mistake, if it was inequitable for him to retain the property. The constructive trust may have for its basis merely a constructive fraud, with no moral guilt attached. A court of equity has no power to "punish" a wrong-doer, except as a necessary incident or consequence of its according to the plaintiff his equitable rights. The magnitude of the consequences in any case requires of the court that it shall carefully consider it, not with a view to fix a punishment proportionate to an offence, but to determine the civil rights of the parties to the controversy, and then to administer them. If a suitor's rights are to be determined, not by his title to the property, but by the amount of inconvenience which the wrong-doer will suffer by being required to give up what does not belong to him,

where shall the line be drawn? If the property has, by fortuitous circumstances, increased in value in the hands of the wrong-doer, fifty per cent, shall he surrender? but if 500 per cent., shall he be permitted to retain it? Does not this inquiry introduce into the administration of justice a novel principle? We do not question the propriety of requiring, in a case like the present, by a rigid rule, that the plaintiff shall establish his right, but having done so, ought the court to refuse to accord him justice because he has been fortunate in the appreciation of his property, and the defendant unfortunate in having to surrender that which he has for so many years enjoyed at the expense of the rightful owner?

It may be a hardship upon the persons in possession of the property to give it up. But they will not be obliged to surrender it unless they have taken it with actual or constructive notice of the plaintiffs' title. If by their own mistake or carelessness, they have failed to investigate the title before they purchased, their loss will be their misfortune, not the plaintiffs' fault, and the court cannot through sympathy relieve them from the consequences of their negligence.

The Court throws out, as an additional reason why the heirs of Sophia Felix should not be permitted to recover their own, the suggestion that if she had not been defrauded of her land scrip, but had located it herself, perhaps, or probably, she would not have realized a tithe of the sum that is now demanded of the defendants.

When a constructive trust is established, and the trustee, who is without moral guilt, is found to have made extraordinary profits out of the trust funds, was it ever before contended that he could escape the full measure of his responsibility to account for every dollar of the profits received by him, by the suggestion that, perhaps the fund in the owners' hands would not have been so remunerative? Besides, the trustee, by his wrongful and voluntary act, has deprived the owner of the chance of making the same profits.

The only cases cited by the court in *Felix* v. *Patrick* upon the laches feature, are *Wood* v. *Carpenter*, 101 U. S., 135, *Boyd* v. *Boyd*, 25 Ind., 429, *Wynne* v. *Cornelison*, 52 Ind., 312, and *Badger* v. *Badger*, 2 Wall, 92.

These cases are cited to sustain the proposition, that the bill is defective for failure to show how the fraud came to be discovered and why it was not discovered before, and because no acts of Patrick in this connection are averred in the bill to show that his concealment was more than that of silence, which is not enough. The case of *Wood* v. *Carpenter*, as well as *Boyd* v. *Boyd* and *Wynne* v. *Cornelison*,

arose under the statutes of Indiana. The statute of limitations relied upon by the defendants in each of those cases, declares:

"The following actions shall be commenced within six years after the cause of action has accrued, and not afterwards * * *. If any person liable to an action shall conceal the fact from the person entitled thereto, the action may be commenced at any time within the period of limitation after the discovery of the cause of action."

It is said that both of these provisions apply to actions for fraud.

In *Wood* v. *Carpenter* the concealment relied upon by the plaintiff to prevent the running of the statute is set forth in general terms, and with no specifications or details. It will be observed, that this statute, upon its face, requires an active concealment by the person liable, in order to prevent the bar of the statute. This case is a construction of the Indiana statute. It is no authority for a case arising under the statute of limitations of Minnesota, the terms of which are entirely different in this regard.

It has been held that the Minnesota statute applies to constructive fraud in cases where there was no active concealment of the facts.

In the complaint in *Wood* v. *Carpenter* there was no explanation of the plaintiff's failure to discover the alleged frauds at an earlier day, although it was evident that proper diligence could not have failed to unearth them. For this reason it was held that the action, which was a suit at law, was barred by the statute of limitations.

Boyd v. *Boyd*, 27 Indiana, 429, was an action to recover damages for fraud in exchange of lands. The answer set up the statute of limitations above quoted. The reply alleged that the defendant had concealed his liability to the action by certain false pretenses made by himself and certain misrepresentations which he induced others to make as to subsequent transactions, the actual truth of which would otherwise have been known to the plaintiff, and would have put him to inquiring, whereby he would have discovered the fraud; that thus deceived, he remained ignorant of the facts.

In this case, Frazier, Judge says:

"We agree with the counsel for the appellee, that the concealment *contemplated by the statute* must be something more than mere silence; that it must be an arrangement or contrivance to prevent subsequent recovery, and must be of an affirmative character."

It is plain therefore, that this case is simply a construction of the Indiana statute, which differs from the statute of Minnesota on the same subject.

In *Wynne* v. *Cornelison*, 52 Ind., 312 (cited in *Fetix* v. *Patrick*), it was decided that

"*The provision of the statute* that if a person liable to an action

shall conceal the fact from the knowledge of the person entitled thereto, the action may be commenced at any time within the period of limitation after the discovery of the cause of action, applies to causes of action for fraud as well as to other causes of action; but the concealment *contemplated by the statute* is something more than mere silence; it must be of an affirmative character, and must be alleged and proved so as to bring the case clearly within the meaning of the statute."

This case was likewise a construction of the statute of Indiana.

Badger v. *Badger* (cited in *Felix* v. *Patrick*) was a case in which a bill was filed against an administrator to obtain relief against fraud perpetrated in the course of administration. It appeared that the complainant might have discovered the alleged fraud at any time within thirty years before the bill was filed, even if he did not have actual knowledge thereof during that period.

His bill was fatally defective because he failed to set forth specifically what were the impediments to the earlier prosecution of his complaint, how he came to be so long ignorant, and how and when he first came to a knowledge of the matters alleged therein.

It may not be unprofitable for us to examine somewhat in detail, the opinions which have been rendered in this case, in the Circuit Court, and in the Circuit Court of Appeals. Judge Williams, District Judge, in the Circuit Court, decides for the defendants solely upon the question of laches, and bases his opinion upon the case of *Felix* v. *Patrick*, and especially upon that part of it which suggests the idea that a court of equity is one in which frauds are to be punished, not equity administered. He seems to think that the case at bar is a much stronger one than *Felix* v. *Patrick*, because in the latter case a scrip was obtained from the Indian woman by false representations and actual fraud, whereas in the case at bar the land warrant was purchased from the widow of the deceased soldier, as guardian of his minor children, and the whole value thereof was paid to her in money. His Honor overlooks the fact that unless she was authorized to sell, she had no right to receive the price of her children's property, and that a constructive trust is none the less enforceable because it originated in a constructive fraud in which there was no actual or moral guilt. If Taylor purchased the minors' interests in this warrant from a person who was not authorized by law to sell, he committed a legal wrong in so doing, and it is a constructive fraud for him, or his grantees with notice, to refuse to restore the property to the persons whose interests were thus illegally transferred.

His Honor says that the plaintiffs could at any time, by a simple

inquiry, have ascertained upon what lands the warrant was located, and thus have been able to institute this action within a reasonable time. But, he loses sight entirely of the fact that the plaintiffs never had the slightest knowledge or information of the existence of their equity to the land warrant in question, or to any other land warrant; so that there was absolutely nothing to prompt an inquiry by them; and under the circumstances it was morally impossible for them to have instituted the investigation. His Honor says, "Instead of doing that, however, they have allowed their rights, if they had any, and their claims, to remain dormant for nearly half a century, until the lands they now seek to obtain by this action are of the value of one million dollars, and the improvements upon them of the value of two million dollars." But his Honor forgets, that with no knowledge of the facts, the plaintiffs could not have done otherwise, and it is no fault of theirs, that the lands have increased in value, or that persons, who ought to have advised themselves of the true condition of the title before they purchased, have made valuable improvements thereon.

His Honor says that in this case, "the plaintiffs originally had no wrong to complain of. They received the full value of the land warrant, granted by the Governor to their ancestor for services in the war with Mexico." But there is no evidence of this. The testimony shows that Mrs. Remsen received $100 for making an unlawful assignment. There is no evidence that her children, ranging from 6 to 16 years old, received any money, or ratified her bargain. Some of them could not understand it at the time, and some of them, if not all, were never informed of it until shortly before the commencement of thisa ction. Under this authority, an infant would not be permitted in a court of equity to set aside the *unauthorized and illegal* sale of his land by a guardian, if it should be shown that the guardian received the value of the land. His Honor cites no case to sustain his decision but *Felix* v. *Patrick, supra*, which we have heretofore attempted to distinguish.

In the Circuit Court of Appeals, the opinion was delivered by Judge Thayer. He finds that Elizabeth Remsen, the guardian, "appears to have obtained no order from the Orphans' Court aforesaid, authorizing her to sell her children's interest in the land warrant." See record, page 356. Judge Thayer lays down the doctrine that the plea of laches does not always depend for its support upon mere lapse of time, but upon the manifest inequity of permitting the claim to be enforced in view of some change in the condition of the

property, or in the relation of the parties to the controversy. If Judge Thayer means by this to hold that property which is affected with a constructive trust, may not be followed, simply because it has increased in value, we take issue with him, and say that the doctrine is unjust, and unsupported by authority. But if he means to say that the rule requiring a suitor to plead or prove some adequate cause for his silence and inaction, in every instance where there has been an apparent want of diligence, is applied and enforced with great strictness in those cases where a person seeks to fasten upon another a constructive trust with respect to personal or real property, which has rapidly appreciated in value, or been improved by those in possession, or when the rights of innocent third parties have intervened and attached, we are not disposed to dispute the proposition.

His Honor says: "It is not claimed, however, that any fraud was practised upon the plaintiffs, or that knowledge of the issuance and sale of the land warrant was intentionally concealed from them with a view of preventing them from ascertaining their rights, either before or after they attained their majority."

We submit, under all the authorities, that a constructive trust may be built upon a constructive fraud, or what is equivalent thereto, an innocent mistake participated in by both parties, by which the one purchased from the other the land of an infant which in law she has no right to sell. In such a case, a constructive trust is raised in favor of the infant, without any actual fraud having been practiced by him. And in such case, the transaction may go upon the public records, so that it might be said that the sale of the land was not intentionally concealed from the infant, and yet a delay on the part of the infant, after attaining his majority, to enforce his rights, may be explained by showing that he was totally ignorant of those rights, without reference to the question whether any fraud has been practiced upon him, or the facts have been concealed from him by any one; and he may enforce the trust.

His Honor says: "Proceeding to consider this question, we may be permitted to intimate a serious doubt whether all or any of the minor heirs of George W. Remsen, who are represented in this action, were in fact ignorant of the issuance, sale and assignment of the land warrant by their mother and older sister when the sale was made."

In other words his Honor doubts—seriously doubts—whether the infant George W. A. Remsen, then six years old, was at that time ignorant of the issuance, sale and assignment of the land warrant; and so he doubts as to the ignorance of the other children, simply because they were living with their mother, although they have each

of them, who are now alive, solemnly testified that the first knowledge or information of the transaction came to them in 1889 and 1891. There is nothing in the testimony that makes it improbable that the children, who knew that their mother was in receipt of a pension on account of the services of their father, did not know the precise facts connected with her receipt of $100, if in truth they knew of it at all, or nid not know that it was not received on account of the aforesaid pension.

His Honor bases his judgment mainly upon the proposition that the minors, when they attained their majority, were all affected with knowledge of the law which granted to them and their mother 160 acres of land and entitled them to receive a warrant therefor from the Government, and that they must also be presumed to know whatever would have been discovered had they made use of the knowledge which they are presumed to have possessed. Laches involves the idea of carelessness, of neglect, of culpable neglect, of blame. There is no such thing as *innocent* laches. The penalty of laches is the loss of rights. The penalty ought not to be visited upon the plaintiffs, unless they were responsible for their actual ignorance of the Mexican land bounty law.

His Honor seems to think that if the rule of presumption can be invoked by the plaintiffs to affect the defendants with notice of the flaw in their title, it can with equal justice be invoked by the defendants in order to show that the plaintiffs were many years ago affected with knowledge of the law that should have put them upon inquiry. But the cases are very different. Under the rule of *caveat emptor*, a prudent man should always have the title to land, which he proposes to purchase, investigated. If he chooses not to do so, he must take the consequences. He is therefore presumed to know whatever the public records will disclose concerning the title to the land in question. This is a positive force that impels him to action, and he is blameable—culpable—if he disregards it. Not so with the man whose laches is constructed by the court upon a presumption on a presumption. The Remsen heirs are to be presumed to know the law, and they are to be presumed to have investigated all the facts relating to a right which they might have claimed under the said law, because they are presumed to know the law. There is, however, no active force impelling them to make the investigation. On the contrary, it would be folly to suppose that they had made or were bound to make, an investigation of a question to which they did not posses the faintest clue, and it would be gross injustice to withhold from them their rights because they did not

make an investigation, which, under the circumstances it was impossible for them to make.

His Honor says, that "the hand of the Chancellor will be stayed when to act would be to do an injustice." Of course that depends very much upon is considered to be an injustice. If to restore to the children of a Mexican soldier the bounty land which he earned with his life, and with which bounty land they have never parted, be an injustice, because the persons who have enjoyed the possession of the land for so long, will be inconvenienced or disturbed, then the hand of the Chancellor ought to be stayed

Upon this proposition, His Honor cites *Galliher* v. *Cadwell* 145 U.S., 368; *Felix* v. *Patrick*, 145 U. S., 317; *McKenny* v. *Bode*, 73 Minn., 450; and *Murphy* v. *Burk* 47 Minn., 99.

Galliher v. *Cadwell* does not sustain the proposition. In this case G made a homestead entry in Washington Territory in 1872. He died in 1873. The entry was cancelled in 1879 for want of final proof within the seven years. In 1880 the act of June 15, 1880, was passed, (21 Stat., 236, c. 227,) authorizing persons who had made homestead entries to entitle themselves to the lands on paying the Government price therefor. G's widow made application for a patent under this act, and her application was rejected. In 1881 W entered the tract, and in 1882 received a patent for it. In 1884 the widow made an application for a rehearing under the act of 1880, and her applicatian was rejected in the same year. The land having greatly increased in value by the growth of the city of Tacoma, C, claiming through conveyances from W, filed a bill to quiet title, making the widow a defendant. The widow answered, setting up as a prior right the homestead entry. It was held,

"(1) That it was doubtful whether the widow of G was entitled to the benefit of the Act of June 15 1880; but that, without deciding that question,

"(2) In view of the rapid and enormous increase in value of the tract, and *her knowledge of all the circumstances*, which must be assumed from her near residence to the property, a court of equity would not distub a title legally perfect, created by the General Government, after a decision adverse to any reservation of the homestead right, and on the faith of which costly improvements had been made.

Mrs. Galliher was plainly guilty of gross laches, which amounted to acquiescence, and Mr. Justice Brown says, at page 371:

"It is unnecessary to rest our decision upon these matters. The laches of the appellant is such as to defeat any rights which she

might have had, even if these prior questions were determined in her favor.

* * * * * * * * *

"The cases proceed on the assumption that the party to whom laches is imputed has knowledge of his rights, and an ample opportunity to establish them in the proper forum; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless or have been abandoned; and that because of the change in the condition or relations during this period of delay, it would be an injustice to the latter to permit him to now assert them."

McKinny v. *Bode*, 33 Minn., 450, is cited in the opinion. The facts were as follows:

"At a sale of school lands in 1872 M. purchased a tract of such land, paid part of the purchase-price, and the interest on the remainder to the succeeding June, received the usual certificate, went into possession, built a house, paid the interest due June, 1873, and remained in possession till December, 1873, when he executed an assignment of the certificate to his wife, and abandoned the land and his wife and family, and never afterwards resumed possession, nor gave further attention to the matter. The wife and family remained in possession, and from December, 1873, a son who remained with his mother paid the taxes on the land and the interest on the unpaid purchase-money, for and on account of his mother, until her death, in 1880, and after her death for and on account of her estate, under license from the probate court sold and assigned the certificate to A. The latter thereupon paid to the land commissioner all arrears of principal and interest on the certificate, and a patent for the land was issued to him. *Held*, that although the assignment of the certificate to the wife was void, M. had at the time of issuing the patent no equity to the land as against A."

Mr. Chief Justice Gilfillan in this case said:

"He must show that he was equitably entitled to the land and to the issuance of a patent to him, so that the issuance of it to the patentee and the retention of the legal title and possession by the latter, operate as a fraud upon him. Otherwise, the legal title evidenced by the patent must prevail.

"Did this plaintiff show such superior equities? The bare statement of the foregoing facts indicates the proper answer. Seven years before the patent issued he abandoned the land and gave up the design to become himself entitled to a patent; abandoned, in fact if not in law, all interest in the matter. Had nothing been done but what he did, all rights under the certificate would have been forfeited six years before the patent issued. Others, by performing its conditions, kept it alive, not acting upon his procurement nor for him, nor intending what they did to be for his benefit, but acting in their own behalf, for their own interest, and upon the notion (grossly mistaking the law) that the legal interest in the certificate had passed by his assignment to Mrs. McKinney. And after

the patent was earned and issued he seeks to appropriate the benefit of what was done by those who earned it, taking his stand solely on the naked legal proposition that his attempted assignment to Mrs. McKinney was void. There is no equity in that."

This case does not support the opinion of the Circuit Court of Appeals.

Murphy v. *Burk*, 47 Minn., 99, decides, that after an abandonment by the holder of a certificate of school lands to all claim to the lands, for ten years, with a full knowledge of all the facts pertaining thereto, and an utter neglect, for more than ten years and until patent issued, to comply with the conditions of the certificate, the equity of the holder of the certificate is not superior to that of one who, under a void tax sale of the lands, complies with the requirements of the certificate, and so earns and receives the patents. The prior holder of the certificate has, by his conduct, misled the patentee, and is equitably estopped. The case is not distinguishable from the case of *McKenney* v. *Bode*.

His Honor says that "more than forty years ago the widow of George W. Remsen sold the land warrant in question for full value, and doubtless used the proceeds for the support and maintenance of her minor children. If she sold it without having the authority of the Orphans' Court, her action was due solely to a mistake of law. The testimony does not raise the slightest suspicion or attempt at concealment, either on her part or on the part of the purchaser."

In other words, if a mother, without any warrant of law, sells her children's land, they can never set aside the deed, if it can be shown that she received full value for it, or if it it can be shown that she used the proceeds in the performance of her obligation to support and maintain her children, or if in the absence of any evidence upon the point, the chancellor will assume it. They can never successfully attack the deed, if it can be shown that her action was due to a mistake of law. They can never recover their property in a court of equity, unless they can show that there was actual fraud in the transaction and an attempt at concealment of the facts from them.

His Honor says that "hundreds of people who were at least as innocent as these plaintiffs, have spent their money in purchasing portions of the property and improving it in divers and sundry ways"

If these people are equally innocent with the complainants —if their equities are equal, the legal title will prevail, and they

will retain the land. But we deny that they are equally innocent. The complainants have been guilty of no laches, because they could make no investigation in utter darkness. The defendants are to blame for not examining the public records, which contain proof of the infirmity of their title, and which were always open to them, and which, if examined, would have warned them of their danger.

In support of the rule requiring a suitor to plead some adequate excuse for his supposed laches, his Honor, Judge Thayer, in the Circuit Court of Appeals, cites the following cases:

Badger v. Badger, 2 Wall. 87, 95.
Godden v. Kimmell, 99 U. S., 201.
Galliher v. Cadwell, 145 U. S., 368.
Felix v. Patrick, 145 U. S., 317.
Lemoine v. Dunklin Co., 38 Fed. Rep., 567.
Railroad v. Sage, 49 Fed. Rep., 315.
Naddo v. Bardon, 51 Fed. Rep., 493.
Lemoine v. Dunklin Co., 51 Fed. Rep., 487.

All these cases have been considered in this argument, except that of *Lemoine* v. *Dunklin Co.*

We admit the existence of the rule, and its application to the present case.

In *Lemoine* v. *Dunklin County* 38 Fed. Rep., 567, the bill alleged the purchase of swamp lands from the defendant county thirty years before, the payment of the purchase price in full, and the issue of certificates entitling the holder to a patent from the Governor; and further averred the duty of the Governor to issue the patent until a short time afterwards, when power to issue patents was conferred on the county court, and the bill asked that the county be decreed to convey the legal title. It was held that the bill disclosed the relation of trustee and *cestui que trust* as to the legal title, and as there were no allegations concerning the possession, and it was not shown that the county had done anything in disaffirmance of the trust until a short time before suit, or that third persons had acquired intervening rights, the court could not declare on demurrer that complainant was barred by the statute of limitations, neither did the bill disclose such laches as will bar the right to relief. That whatever constructive possession the county may have by reason of its being vested with legal title does not bar complainant's right. Actual possession is necessary for that purpose.

His Honor, Judge Thayer, in delivering the opinion of the court, says:

"Various cases have been cited by defendants' counsel with a view of establishing that the cause of action is stale, but the Court has not been able to concur in that view. The case of *Speidel* v. *Henrici*, 120 U. S., 377, is first referred to. In that case the court found that the trustee proceeded against had affirmed the trust fifty years before the bill was filed. The bill showed that for that period the trustee had constantly avowed that he held the trust property upon a trust entirely different from that which complainants sought to establish and enforce. In other words, the case was decided on the theory that the trust had been disavowed for such a length of time that the complainant, who had knowledge of such disavowal, was barred of his right by laches. In the case of *Marsh* v. *Whitmore*, an effort was made to establish a constructive trust in personalty nearly twelve years after the transaction in which it arose. The bill did not state exactly when or how complainant became aware of the transaction out of which the trust arose, and it was accordingly held to be demurrable. The rule is well settled, of course, that a person who seeks to enforce a constructive trust, or obtain equitable relief on the ground of fraud, must act diligently on discovering the fraud or the transaction out of which the trust arises, as the trustee in such a trust always holds adversely to the beneficiary, and the right to pursue him may be easily lost by laches. The case of *Brown* v. *Buena Vista*, 95 U. S., 157, was a bill filed to set aside a judgment on the ground of fraud, and the proceeding was held to be barred by laches. The case is not important, except in so far as it shows, that in such cases, a complainant must act with commendable promptness after discovering the fraud. In the case of *Hume* v. *Beale*, 17 Wall, 347, a bill was filed to charge the estate of a trustee with a breach of trust committed thirty-seven years before the action was instituted. The breach of trust was known to the complainant many years, and it was for that reason held that equity would not grant relief. *Badger* v. *Badger*, 2 Wall, 92, was a case in which a bill was filed against an administrator to obtain relief against fraud, perpetrated in the course of administration. It appeared that the complainant might have discovered the alleged frauds at any time within thirty years before the bill was filed, even if he had not had actual knowledge thereof during that period, and the cause of action was accordingly adjudged to be stale. *Godden* v. *Kimmell*, 99 U. S., 201, is of the same general character as the case last mentioned.

This case was affirmed in *Lemoine* v. *Dunklin Co.*, 51 Fed. Rep., 487.

XII.

THE COMPLAINANTS WERE GUILTY OF NO LACHES AFTER DECEMBER, 1889.

This proposition has been considered somewhat in the foregoing argument. It is not necessary to repeat the facts bearing upon it. The inquiry here is as to laches properly so called, which means

a negligent delay to assert one's rights. The period between December, 1889, and the filing of the bill in any view is far short of the statutory period of limitation—six years after the discovery of the facts constituting the fraud. And it is pushing the doctrine of laches to an unwarrantable extent to hold that it is a bar short of the statutory period of limitation. It appears that no one has been prejudiced by the lapse of time since 1889; and a considerable portion of this time being necessary for the actual preparation of the bill. If, as held in the Sage case by the Circuit Court of Appeals, the State statute of limitations is binding on the Federal Court, the plaintiff must have six years to sue after discovery of the fraud, as he would have in the State courts.

XIII.

THE COMPLAINANTS ARE WILLING TO DO EQUITY.

Althongh improvements are not allowed where the defendants have knowledge or notice of claimant's right (Diffeback v. Hawke, 115 U. S., 407), complainants are advised that the question of assessment of improvements is not raised in the pleadings herein, but by agreement of counsel is to be considered only when raised under the Claimant Act of the State of Minnesota.

While the plaintiffs conceive that they are entitled to a decree in this suit declaring the trust which they have set up, requiring a reconveyance of all the property and an account of the rents and profits, they do here and now consent that each piece and parcel of land into which the 160 acres has been subdivided shall be charged in favor of the respective defendants claiming the same, with the value of all improvements placed thereon with interest, less a fair rental from the time when the respective improvements were placed thereon.

The decree should be reversed.

JOHN W. HINSDALE,
Solicitor and of Counsel for Appellants.

Raleigh, N. C., January 17, 1898.

NOTE—In the preparation of the foregoing argument I have made liberal of the able briefs of Messrs. C. W. Bunn and William C. Mayne.

J. W. H.

Office Supreme Court U. S.
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No. 94.
Sup. Brf. of Hinsdale for
Appellants.

Filed Feb. 5, 1898.

Supreme Court of the United States,

OCTOBER TERM, 1897.

No. 94.

ELIZABETH WETZEL ET AL., APPELLANTS,

vs.

THE MINNESOTA RAILWAY TRANSFER CO., ET AL.,

RESPONDENTS.

SUPPLEMENTAL BRIEF

OF

JOHN W. HINSDALE,

OF COUNSEL FOR APPELLANTS.

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1897.

No. 94.

ELIZABETH WETZEL ET AL., APPELLANTS,
against
THE MINNESOTA TRANSFER RAILWAY ET AL.,
RESPONDENTS.

Supplemental Brief of Counsel for Appellants.

XIV.

THERE IS NO PRESUMPTION OF LAW THAT THE MINOR CHILDREN OF GEORGE W. REMSEN, UPON ATTAINING THEIR MAJORITY, KNEW OF THE ACT OF CONGRESS OF FEBRUARY 11, 1847, AND OF THEIR RIGHTS THEREUNDER.

The learned counsel for the respondents argue that all men are presumed to know the law; and that, therefore, the minor children of George W. Remsen, when they respectively became of age, knew that from seven to fifteen years prior thereto and while they were infants, there was in force an act of congress, which entitled their father and themselves to claim a land warrant for 160 acres of land; and that they and their children, who are the complainants, are guilty of culpable negligence, or laches, in not making an investigation of their rights in the premises at an earlier day, although they were totally and inevitably ignorant of them until shortly before this suit was instituted.

The learned counsel by their argument admit that it is necessary for them to show laches in the complainants, for that lapse of time, *without laches* will not avail them in a court of equity, especially when there is no adverse possession for over 13 years (less than the statutory period to bar an action for the recovery of real estate in Minnesota)

except as to a strip of land over sixty acres of the tract, known as the right-of-way of the Minnesota and Pacific Railroad Company.

This court, in every case of laches which has ever come before it, might have disposed of it very summarily if the sheer lapse of time, unaccompanied by laches, was sufficient to bar the rights of the claimants. But in every case the court carefully points out the negligence of the delay and the fact of long knowledge of his rights by the complainant.

The counsel with all their ability and industry fail to cite a single authority to sustain the position, that lapse of time without laches will bar the rights of the complainants in an equitable jurisdiction. Hence the earnestness with which they invoke that fiction "that every man is presumed to know the law."

The counsel rely upon the maxim, "*ignorantia legis neminem excusat.*" But it has no application in the present case. The maxim is accurately stated, "ignorance of the law excuses no one," not "every man is presumed to know the law," and the statement of the maxim indicates its limitations.

Mr. Lawson in his work on Presumptive Evidence, on page 5, states the rule with technical precision. He says:

"*Every one is presumed to know the law when ignorance of it would relieve from the consequences of a crime or from liability upon a contract.*

Laing v. Colder, 8 Pa. St., 479; 49 Am. Dec., 533 (1848).
Kay v. Connor, 8 Humph., 624; 49 Am. Dec., 690 (1848).
Cluff v. Mutual Benefit Life Ins. Co., 13 Allen, 308 (1866).
Sherrill v. Hopkins, 1 Cow., 103 (1823).
Gast v. Drakely, 2 Gill, 330 (1844).
Oilex v. Gard, 23 Ind., 212 (1864).
Brown v. Beers, 6 Conn., 213 (1826).
Cockayne v. Summer, 22 Pick., 117 (1839).)

"The presumption that every person knows the law is often spoken of, but it is clear that there is no such general presumption. When Mr. Dunning, in arguing before Lord Mansfield, said: 'The laws of this country are clear, evident and certain; all the judges know the laws, and knowing them administer justice with uprightness and integrity,' that learned judge replied: 'As to the certainty of the law mentioned by Mr. Dunning, it would be very hard upon the profession if the law was so certain that everybody knew it; the misfortune is that it is so uncertain that it costs much money to know what it is, even in the last resort.'

Jones v. Randall, Cowp., 38."

Mr. Jones in his Law of Evidence, Vol. 1, p. 44, sec. 20, gives the *raison d'etre* of the rule, which shows its limitation, and confirms the view of Mr. Lawson. In its application to the case at bar the reason of the rule fails, and the rule fails with it. Mr. Jones says:

"The maxim, *ignorantia juris non excusat*, is based on the fact that there could be no successful administration of justice if the converse of the rule were tc prevail. If prisoners accused of crime could successfully plead that they were ignorant of the illegality of their acts, no other shield for crime would need to be interposed; for no other defense could be so easily raised or so difficult to overcome. If ignorance of the law was admitted as a ground of exception, the court would be involved in questions which it were scarcely possible to solve and which would render the administration of justice next to impossible; for in almost every case ignorance of law would be alleged and the court would, for the purpose of determining this point, be often compelled to enter upon questions of fact insoluble and indeterminable."

"Although it has been sometimes stated that the rule has no application except in criminal cases, there seems to be no good reason for confining the rule to the criminal law. The same considerations which forbid a party to urge his ignorance of the law as a defense to a criminal charge also forbid that he should plead his ignorance of the law as an excuse for the failure to comply with contract obligations or as a defense in actions of tort. Accordingly in actions for false imprisonment officers cannot defend on the ground that they had supposed void writs to be valid."

Mr. Wharton in his Law of Evidence, Vol. 2, at page 375, sec. 1240 discussing this maxim, says:

"That the axiom contains an untruth is conceded. No man in a civilized community knows the law either intensively or extensively; there is no thinker, no matter how profound, who has not left some depths unfathomed; no reader, no matter how omnivorous, who has not left some details untouched. To predicate that of the ignorant which cannot be predicated of the learned specialist is absurd.

"Besides," objects Mr. Livingston, in his Report on the Louisiana Penal Code, "is it not mockery to refer me to the common law of England? Where am I to find it? Who is to interpret it for me? If I should apply to a lawyer for a book that contained it, he would smile at my ignorance, and, pointing to about five hundred volumes on his shelves, would tell me those contained a small part of it; that the rest was either unwritten or might be found in books that were in London or New York, or that they were shut up in the breasts of the judges at Westminister Hall. If I should ask him to examine his books and give me the information which the law itself ought to have afforded, he would hint that he lived by his profession, and that the knowledge he had acquired by hard study for many years could not be gratuitously imparted. Your law, therefore, I repeat,

is absurd in its consequences if taken literally, and mocks us by a reference to an inaccessible source for an explanation of its obscurities."

"But, predicated it is both of ignorant and learned, *so far as to establish the conclusion that no one is allowed to set up ignorance of law as an excuse for wrong.* For this several reasons are given. Mr. Austin inclines to think that the law refuses to recognize ignorance of the law as a defence, because it has no test by which ignorance of law can be measured. Who can tell whether, in any given case, such ignorance exists? Who can tell whether such ignorance is inevitable? Pascal argues that society would be destroyed if such an excuse were held good.

"It must be remembered at the same time that the knowledge of law, which is here assumed, is simply practical knowledge, commensurate with the duties whose non-discharge the law, in the concrete case, condems. A person who *commits a public wrong* for instance, is bound to know that the wrong is subject to penal consequences: if it is *malum in se* his natural consciousness points to this, and it would be fatal to government to allow want of such natural consciousness to be a defence; if it is *malum prohibitum*, it should be known by him, for it his duty, when he undertakes to abide in a community, to *know what it prohibits*, since otherwise no police law could be enforced. But when questions of construction of documents come up, then, as we will hereafter see more fully, a party cannot be always held liable civilly for adopting a probable construction which the courts may ultimately hold to be erroneous.

"But that a persom who is *capax negotii* should set up ignorance of fact as ground of exculpation or of defence, would be against the policy of the law; and hence, where there is no fraud or coercion, the law treats him as if he were *cognizant of what he did. He is not supposed to have known facts of which it appears he was ignorant; but if his ignorance is negligent or culpable, then the law declares it cannot protect him.*"

Mr. Wharton in his work on Criminal Evidence, at Sec. 723, page 580, says:

"That knowledge of the law, on the part of all persons *charged with crime*, is *so* far presumed that *they* cannot set up ignorance of the law as *a defence*, is an axiom of jurisprudence. That the axiom contains an untruth is conceded."

R. v. Price, 3 P. & D., 421; S. C., 11 A. & E., 727.
Middleton v. Croft, Str., 1056.
R. v. Esop, 7 C. & P., 456.
R. v. Good, 1 C. & K., 185.
Stokes v. Salmons, 9 Hare, 79.
R. v. Hoatson, 2 C. & K., 777.
R. v. Bailey, R. & R., 1.

Stockdale v. Hansard, 9 A. & E., 131.
Barronet's case, 1 E. & B., 1.
U. S. v. Learned, 11 Int. Rev. Rep., 149.
The Ann, 1 Gallis, 62.
U. S. v. Anthony, 11 Blatch., 200.
Cambioso v. Maffett, 2 Wash. C. C., 98.
Com. v. Bagley, 7 Pick., 279.
Hamilton v. People, 57 Barb., 625.
State v, Hart, 6 Jones (N. C.), 389.
McGuire v. State, 7 Humph., 54.
Winehart v. State, 6 Ind., 30.
Black v. Ward, 27 Mich., 191.
Whitton v. State, 37 Miss., 379.
Chaplin v. State, 7 Tex. Ap., 87.

Mr. Wharton in his Law of Negligence at Sec. 411, page 346, says:

"That the law of the land is known by all subjects is a postulate often assumed to establish the conclusion that persons are liable for the *consequences of a negligent mistake of law.* But this postulate, although accepted as *legal fiction,* is so *preposterously false* in fact that juries will not readily adopt it as a meritorious basis of a suit.

"The most eminent and experienced judges, for instance, when called upon to act without study or counsel in their private business (e. g., as in making of their own wills,) show, by their blunders and inadvertencies, that there is no man who, in the ordinary affairs of life, can possess himself of the laws of the land, except by deliberation and study. The reason for this is to be found not merely in the incapacity of the actor himself, but in the character of the law, of which he is supposed to be master. For that law is not only so extensive, viewing it in all its branches, as to exceed the bounds of ordinary comprehension, but is so progressive as to involve conclusions as yet imperfectly expressed. The idea of Blackstone, that the common law of England consists of a fund of established though unwritten jurisprudence, from which each judge draws what is necessary for every litigated case, is now universally dismissed as incorrect. By each new decision the law as previously announced is extended. By many new decisions the law as previously announced is overruled. In many new cases the law penetrates to new fields, invoking for them new rules. The law applicable to multitudes of combinations of acts, therefore, is a law which is not determined until those particular combinations of acts are specifically judicially scanned; and even then we cannot be certain what this law is until it has been affirmed by the highest territorial court having jurisdiction.

"It is *necessary to society* that ignorance of the law should be no excuse for an act the law pronounces *to be unlawful;* because igno-

rance of the law is a subject which the courts have no capacity to determine. This is the position taken by Mr. Austin, in those lectures which form the most philosophical treatise on general jurisprudence which has as yet sprung from English pen, 'The *only sufficient reason for the rule* in question,' he declares, 'seems to be this: that if ignorance of the law were admitted as a ground of exemption, the courts would be involved in questions which it were scarcely possible to solve, and which would render the administration of justice next to impracticable. If ignorance of law were admitted as ground for exemption, ignorance of law would always be alleged by the party, and the court, in every case, would be bound to decide the point. But in order that the court might decide the point, it were incumbent upon the court to examine the following questions of fact: 1st. Was the party ignorant of the law at the time of the alleged wrong? 2d. Assuming that he was ignorant of the law at the time of the wrong alleged, was his ignorance of the law inevitable ignorance, or had he previously been placed in such a position that he might have known the law, if he had duly tried? It is manifest that the latter question is not less material than the former. * * * Now, either of these questions were next to insoluble. Whether the party was really ignorant of the law, and was so ignorant of the law that he had no surmise of its provisions, could scarcely be determined by any evidence accessible to others. And for the purpose of determining the cause of his ignorance (its reality being ascertained), it was incumbent upon the tribunal to unravel his previous history, and to search his whole life for the elements of a just solution. The reason for the rule in question would, therefore, seem to be this: It not unfrequently happens that the party is ignorant of the law, and that his ignorance is inevitable. But if ignorance of law were a ground for exemption, the administration of justice would be arrested; for, in almost every case, ignorance of the law would be alleged. And, for the purpose of determining the reality and ascertaining the cause of his ignorance, the court were compelled to enter upon questions of fact, insoluble and indeterminable.' But however strong this position may have been in Mr, Austin's time, it has lost its force since the passage of statutes by which parties can be examined as to their motives, their knowledge, and their ignorance. Ignorance of the law is now as capable of proof as is any other mental state. *The safety of society would be endangered if ignorance of the law were a legal excuse far an illegal act.*"

Mr. Broom in his Legal Maxims at page 253 says:

"With respect to the 'presumption of legal knowledge' here spoken of, we may observe, that, although ignorance of the law does not excuse persons, so as to exempt them from the consequences of *their acts*, as, for example, from punishment for a *criminal offence*, or damages for *a breach of contract*, the law nevertheless takes notice that there may be a doubtful point of law, and that a person may be ignorant of the law, and it is quite evident that ignorance of the law does in reality exist. It would, for instance, be contrary to common

sense to assert that every person is acquainted with the practice of the courts; although, in such case, there is a presumption of knowledge to this extent, that *ignorantia juris non excusat*, the rules of practice must be observed, and any deviation from them will entail consequences detrimental to the suitor. It is, therefore, in the above qualified sense alone that the saying, 'that all men are presumed cognizant of the law,' must be understood."

And at page 263, "It is laid down as a general proposition, that in courts of equity the ignorance of the law shall not affect *agreements*, nor excuse from the legal consequences of *particular acts*, and this rule, as observed by Mr. J. Story, is fully borne out by the authorities."

And at page 267, "Lastly, every man is presumed to be cognizant of the statute law of this realm, and to construe it aright; and if any individual *should infringe it through ignorance*, he must, nevertheless, abide by the consequences of his error. It will not be competent to him to aver, in a court of justice, that he has mistaken the law, this being a *plea* which no court of justice is at liberty to receive."

Mr. Bouvier, in the last edition of his Law Dictionary, at page 978, says:

"The subject may be well summed up by the collation of two or three cases which show the substantial uniformity of the application of the doctrine. 'The maxim *ignorantia legis neminem excusat* is not universally applicable, but only when *damages* have been inflicted or *crimes committed*. It is true that the law will not permit the excuse of ignorance of the law to be pleaded for the purpose of exempting persons from damages for a *breach of contract*, or from punishment for *crimes committed* by them, but on other occasions and for other purposes, it is evident that the fact that such ignorance existed will sometimes be recognized so as to affect a judicial decision." 44 N. J. L, 244. And, 'There is no maxim which says that for all intents and purposes a person must be taken to know the legal consequence of his acts.' Lush, J., in L. R., 3 Q. B., 639. 'It would be too much to impute knowledge of this rule of equity'" (the doctrine of election). Westbury, Ld. Ch., in 11 H. L. Cas., 602."

Mr. Lawson in his Presumptive Evidence, page 13, says:

"The presumption of knowledge of law may be rebutted. 'For instance, if there be an intention to pass a freehold estate, and the vendee accepts a deed of feoffment without livery, he will be relieved upon the ground that he was under a mistake as to the law, for the intention being clear the failure to effect it makes the mistake manifest, and rebuts the presumption.'"

Folger, J., in *People* v. *Clute*, 50 N. Y., 463, speaking of the maxim "*ignorantia juris excusat neminem*," said:

"That maxim in its proper application goes to the length of denying to the *offender* against the criminal law a justification in his

ignorance thereof, or to one liable for a *breach of contract*, or for *civil tort*, the excuse that he did not know of the rule which fixes his liability.

"The maxim itself concedes that there may be a lack of actual knowledge of the law. For it is ignorance of it which shall not excuse. Then the knowledge of the law to which one is held is a *theoretical* knowledge."

In *Adair* v. *Brimmer*, 74 New York, 553, Rapallo, J., says:

"The testimony as to a ratification of these transactions is contradicted by the contestants, and the auditor has found against such ratification. We concur in his conclusion. To establish a ratification by a *cestui que trust*, the fact must not only be clearly proved, but it must be shown that the ratification was made with a *full knowledge* of all the material particulars and circumstances, and also in a case like the present that the *cestui que trust* was fully apprised of the effect of the acts ratified, and of his or her *legal rights* in the matter. Confirmation and ratification imply to legal minds knowlelge of a defect in the act to be confirmed, and of the right to reject or ratify it. The *cestui que trust* must therefore not only have been acquainted with the facts, but apprised of the law how these facts would be dealt with by a court of equity. All that is implied in the act of ratification, when set up in equity by a trustee against his *cestui que trust*, must be proved, and will not be assumed. The maxim '*ignorantia legis excusat neminem*,' cannot be invoked in such a case. The *cestui que trust* must be shown to have been apprised of his legal rights.

Cumberland Coal Co. v. Sherman, 20 Md. R., 151.

S. C., 30 Barb., 575.

Lammott v. Bowley, 6 H. & J., 526."

If in a case of ratification, this maxim cannot be invoked, why should it be applicable to a case of acquiesence or of laches?

In *Harr* v. *Roper*, 6 Ired. Eq., N. C., 349, it is said:

"The maxim, '*ignorantia legis neminem excusat*,' is founded upon the presumption that every one, competent to act for himself, knows the law, but the presumption that he knows it is not conclusive, but may be rebutted. Therefore, when a plaintiff alleges in his bill that he was ignorant of the law, and the defendant demurs, it seems hat the latter cannot take advantage of the maxim."

The conclusion to be fairly drawn from the foregoing authorities is, that the maxim, "ignorance of the law excuses no one," arose from the necessity of the case. Without it there could be no proper administration of the civil or criminal law. It has no application to the case at bar, because the reason for the maxim has failed. So

long as a man is quiescent, no knowledge of the law is imputed to him. But, when he takes a positive step, he must be sure of his ground, or accept the consequences of his ignorance. The maxim may be invoked only by those to whom one owes a duty. The State may invoke it, when its criminal law has been broken. A party to a contract may invoke it, when the other party has violated the contract. One who has suffered an injury may invoke it as against the wrong-doer. But, a trespasser, or a constructive trustee, cannot retain the property of another on the ground that the owner thereof has remained in inevitable ignorance of his rights until just before his application for relief to a court of equity. When one has *acted* to the prejudice of another, his ignorance of the law is no excuse But in the case at bar, the complainants have not acted to the prejudice of any one. They have not acted at all. They have not laid themselves liable for the breach of any law in their failure to know that congress passed the act of February 11th, 1847. They have no sin in this regard from which to ask absolution, nor is there any one to whom they should apply for pardon. They were under no duty to the persons who have taken possession of their lands to know of the act of congress which entitled them to a land warrant. There were no relations, contractual or social, between them and the wrong-doers, which gave the latter the right to invoke this legal fiction in their favor, and to complain of the ignorance of the complainants in a matter which did not concern them.

XV.

NO ONE IS BOUND TO MAKE INQUIRY WHO HAS NO NOTICE EITHER OF THE SUBJECT OF INQUIRY, OR OF ANY FACT WHICH SUGGESTS IT.

The notice which imposes the duty of investigation is the notice of a *fact*. The *actual* knowledge of a *fact*, and not the presumption of knowledge of a law out of which a right may possibly arise, imposes the duty of inquiry.

The learned counsel have failed to cite a single case in which such presumption has been regarded as equivalent to the actual knowledge of the fact.

It would seem to be a strange proposition, that the presumption that the minor children of Geo. W. Remsen knew of the act of congress of Feb. 11, 1847, of which they in fact had no knowledge, must stimulate them to inquiry. Their inevitable ignorance of the law

must be taken as positive knowledge, upon which they must make an investigation, without a starting point, without a clue, without any notice even of the subject which they are to investigate! And the failure to accomplish such an impossibility is to entail upon them the loss of their inheritance! These are hard lines for the children and grandchildren of a soldier who gave his life to his country.

The following authorities indicate that it is *knowledge of a fact* that necessitates further inquiry:

"Generally one is charged with notice of a fact *who has information* putting him on inquiry, if by following up such information with diligence and understanding the truth could have been ascertained."

Jennings v. Todd, 40 Am. St. Rep., 373.

"A purchaser who had *knowledge of a fact* sufficient to put him to inquiry, is presumed to have made inquiry, and is chargeable with notice of whatever it appears he could have ascertained by the inquiry upon which the circumstances should have put him."

Reed v. Gannon, 50 N. Y., 345, rev'g 3 Daly, 414.
Cordova v. Hood, 17 Wall, 1.
Maxfield v. Burton, L. R. 17 Eq., 15, s. c. 7 Moak's Eng., 642.

"One is chargeable with actual notice of facts if he *has knowledge of such facts* as would lead a fair and prudent man to make further inquiries, and if such inquiries, if pursued with ordinary diligence would have given him knowledge of the facts with notice of which he is sought to be charged."

Knapp v. Bailey, 79 Me., 195; 1 Am. St. Rep., 295, and note 300

"Purchaser has notice of not only facts definitely communicated to him, but of all facts which the proper use of that *information* with ordinary diligence and prudence would enable him to ascertain."

Oliver v. Sanborn, 60 Mich., 346.
Gaines v. Summens, 50 Ark., 322.

"It is a rule of frequent application, that one who *has knowledge of facts* sufficient to excite the inquiry of a prudent man in regard to other facts, will be charged with knowledge of such other facts as might have been learned by diligence. *This knowledge* exciting inquiry is called by some of the authorities actual notice, and by

others constructive notice. In either instance, it is equivalent to actual notice as one who has it is affected with the same liabilities as one having actual notice; constructive notice being evidence of notice which the policy of law does not permit to be controverted, and *actual notice being express, direct information of a fact.* Within the meaning of the rule, "circumstances putting one on inquiry" refers to such circumstances as necessarily lead to an acquaintance with the truth. As is concluded by Judge Selden after a lengthy opinion: "The true doctrine on this subject is that where a purchaser *has knowledge of any fact* sufficient to put him on inquiry as to the existence of some right or title in conflict with that he is about to purchase, he is presumed either to have made the inquiry and ascertained the extent of such prior right, or to have been guilty of a degree of negligence equally fatal to his claim to be considered as a *bona fide* purchaser. This presumption, however, is a mere inference of fact, and may be repelled by proof that the purchaser failed to discover the prior right, notwithstanding the exercise of proper diligence on his part."

Lodge *v.* Simonton (2 P. & W., 439), 23 Am. Dec, 47.

"To charge a party with notice of fraud, it is not necessary that he should have actual notice, if he is chargeable with constructive notice; and this may be inferred from *the knowledge of suggestive facts*, which, if followed up, would have led to a discovery of the fraud; that is, *facts* of unusual or suspicious nature, *having reference to the transaction sought to be impeached*, and so related to it, that, if faithfully pursued and inquired into, they would have discovered its true character."

Hodges v. Coleman, 76 Ala., 103.

"Where a subsequent purchaser *has actual notice* that the property is encumbered or affected, he is charged constructively with notice of all the facts and instruments to the knowledge of which he would have been led."

Crumlish v. R. R. Co., 32 W. Va., 245.

"What is sufficient to put a person on inquiry is good notice; that is, where a man *has sufficient information* to lead him to a fact, he shall be deemed cognizant of it. Mere rumor or a suspicion of a defective title is not sufficient to operate as constructive notice."

Parker v. Kane, 4 Wis., 11.

"*Information given* to a purchaser which ought to have put him on an inquiry, will be considered as sufficient notice."

Price v. McDonald, 1 Md., 403.

"Notice is either actual or constructive. Actual notice consists in express information of a fact. Constructive notice is notice implied by

the law to a person not having actual notice; and every person who has *actual notice of circumstances sufficient* to put a prudent man upon inquiry as to a particular fact, and who omits to make such inquiry with reasonable diligence, is deemed to have constructive notice of the fact itself."

Gress v. Evans, 1 Dakota, 387.

"When stock is offered for sale to an officer of a company, by one holding written authority of the character above indicated, there is no rule of law which requires him to inquire the purpose of the sale. He would only be put upon inquiry *when he has knowledge of such facts* as would lead an honest man, using ordinary caution, to make further inquiries, and be taken to have notice of facts about which inquiries should be made, when *with such knowledge* he does not make the inquiry but avoids making it."

Foster v. Ambler, 24 Fla., 520.

"What is sufficient to put a person on inquiry is not necessarily sufficient to charge him with notice. *The fact brought to his knowledge* must be sufficient to put him on inquiry, and the inquiry, if followed up, must reasonably lead to knowledge or notice of the fact sought to be imputed."

Thompkins v. Henderson, 83 Ala., 391.

"A person is not chargeable with notice of a fact, because reasonable inquiry on his part would disclose its existence unless the law casts on him the duty of making such inquiry and this duty only arises when he *has had knowledge of other facts* reasonably contemplated to awaken suspicion."

Kyle v. Ward, 81 Ala., 120.

"Whatever is enough to excite attention, or put a party on inquiry, is notice of everything to which such attention or inquiry might reasonably lead. *Sufficient information* to lead to the knowledge of a fact, shall be sufficient to charge him with the knowledge of that fact."

Parker v. Foy, 45 Miss., 260.

"*Notice of facts* which are sufficient to put the purchaser on inquiry is equivalent to actual notice of the facts which he would have discovered by proper inquiry."

Boggs v. Price, 65 Ala., 514.

"Where one *has notice of an opposing claim*, he is put upon inquiry and is presumed to have notice of everything which a proper inquiry would have enabled him to discover."

Blackwood v. Jones, 4 Jones' Equity (N. C.), 54.

In the above case, Selden, J., says on page 360:

"In *Whitbread* v. *Boulnois* (*supra*), Baron Alderson laid down the rule as follows: 'When a party *having knowledge of such facts* as would lead any honest man using ordinary caution, to make further inquiries, does not make, but on the contrary studiously avoids making such obvious inquiries, he must be taken to have notice of those facts, which, if he had used such ordinary diligence, he would readily have ascertained. This very plainly implies that proof that the party has used due diligence, but without effect, would repel the presumption. In this case, it is true, the decision was against the party having the notice. But in *Jones* v. *Smith* (1 Hare, 43), we have a case in which a party, who *had knowledge* sufficient to put him on inquiry, was nevertheless held not bound by the notice."

"One who is put upon inquiry by certain *facts within his knowledge* is affected with notice of everything that such inquiry would have discovered."

May v. Hanks, Phillips' Eq. (N. C.), 310.

Whatever puts a party upon inquiry amounts to notice, provided the inquiry becomes a duty and would lead to the knowledge of the requisite fact by ordinary diligence and understanding.

General rumor of the fact is not sufficient to place a party on inquiry. There must be *some act or declaration from an authentic source* which a person would be careless if he disregarded.

Maul v. Rider, 59 Pa. St., 167.

"Notice is actual when one either has knowledge of a fact, or is *conscious of having the means of knowledge*, although he may not use them. Actual notice may be divided into express and implied. The implication of notice arises when the party to be charged is shown to have knowledge of such facts and circumstances that would lead him, by the exercise of due diligence, to a knowledge of principal facts. The doctrine of actual notice implied by circumstances (actual notice in the second degree) necessarily involves the rule that a purchaser before buying should clear up all doubts which apparently hangs upon the title, by making due inquiry and investigation. If a party *has knowledge of such facts* as would lead fair and prudent men using ordinary caution to make further inquiry, and he avoids the inquiry, he is chargeable with notice of the facts which by ordinary diligence he would have ascertained. He has no right to shut his eyes against the light before him. He does a wrong not to heed the *sign and signal seen* by him. It may be well concluded that he is avoiding notice of that which he really believes or knows. *Actual notice of facts* which to the mind of a prudent man indicates notice is proof of notice."

Camp v. Bailey, 79 Me., 195.

"There must appear to be, in the nature of the case, such connection between *the facts discovered* and the further facts to be discovered, that the former may be said to furnish a clue, a reasonable and natural clue to the latter."

Birdsall v. Russell, 29 N. Y., 249.
Page v. Warning, 76 N. Y., 463.
Chaflin v. Lenheim, 66 N. Y., 306.
Williamson v. Brown, 15 N. Y., 354.
Cambridge Valley Bank v. Delano, 48 N. Y., 323.
Booth v. Barnum, 9 Conn., 286; s. c., 23 Am. Dec., 339.
French v. Layal Land Co., 5 Leigh Va., 627.

"The principle of constructive notice is always resorted to in order to prevent the person having it from *doing an act to the injury* of another, and does not apply where the question is whether one was barred by his assent to a fraud practiced on him."

Spencer v. Spencer, 3 Jones Eq.. N, C., 404.

"*Information* which makes it the duty of a party to make inquiry, and shows where it may be effectually made, is notice of all facts to which such inquiry might have led. But a party thus put on inquiry, is to be allowed a reasonable time to make it before he is affected with notice.

Carr v. Hilton, 1 Curtis (U. S.), 390.

In the above case, Curtis, J., says, page 393:

"The rule respecting notice is well settled. It is correctly laid down in *Kennedy* v. *Green*. 3 N. Y., & K., 719, 721, 722. 'It is the well established principle, that *whatever is notice enough to* excite attention, and put the party upon his guard, and call for inquiry, is notice of everything to which such inquiry might have led. When a person *has sufficient information* to lead him to a fact, he shall be deemed conversant of it.' In support of this, many cases may be cited. It will be sufficient to refer to a few of them: *The Ploughboy*, 1 Gallis, 41; *Hinde* v. *Vattier*, 1 McLean, 118; *Bowman* v. *Wathen*, 2 McLean, 376; Sugden on Ven. & Pur., 1052, and cases there cited."

In *Williamson* v. *Brown* (15 N. Y., 334), the rule is stated by Selden, J., at page 362, as follows:

"The true doctrine on this subject is that where a purchaser has *knowledge* of *any fact* sufficient to put him on inquiry as to the existence of some right or title in conflict with that he is about to purchase, he is presumed either to have made the inquiry and ascertained the extent of such prior right, or to have been guilty of negligence equally fatal to his claim to be considered as a *bona fide* purchaser."

And Paige, J., in the same case, states the rule as follows:

"A party *in possession of certain information* will be chargeable with a knowledge of all facts which an inquiry suggested by such information, prosecuted with due diligence, would have disclosed to him." Citing as authority *Howard Ins. Co.* v. *Halsey*, 4 Sandf. Sup. Ct., 578; *Kennedy* v. *Green*, 3 Mylne. and Kees., 699.

In *Flagg* v. *Mann et al.* (2 Sumner, 554), Story, J., states the rule as follows:

"If he does not inquire he is bound in the same manner as if he had inquired and had positive notice of the title of the party in possession. A purchaser who has *notice of such facts* as, with ordinary diligence, would lead him to a full knowledge of an outstanding equity, is a purchaser with notice."

Hinde v. Vattier, 1 McLean (U. S.), 110.

The learned counsel argue that the complainants are presumed to have investigated and discovered the defendants' claims, because the former are presumed to know of the act of congress of February 11, 1847, under which their rights arose.

This is a presumption upon a presumption, which is not favored.

"Inferences from inferences are not permitted—only immediate inferences from facts proved. If the presumed fact has no immediate connection with or relation to the established fact from which it is inferred, it is regarded as too remote. Thus, the presumption that a public officer has done his duty does not supply proof of independent and substantial facts."

United States v. Ross, 92 U. S., 283, 284.

Grand Trunk R. Co. v. Richardson, 91 U. S., 470.

"A judge in deciding that evidence of a particular circumstance is not receivable impliedly decides that no presumption can be drawn from it which ought to have effect with the jury. A presumption which the jury is to draw is not a circumstance in proof, and it is not, therefore, a legitimate foundation for a presumption. There is no 'open and visible connection' between the facts out of which the two presumptions arise."

McAleer v. McMurray, 58 Pa., 126.

"An inference from an inference, if allowed at all, has little probative force."

Ayer v. Steamer Glaucus, 4 Cliff., 171.

"A presumption cannot be based upon a presumption, for there is no open and visible connection between the facts out of which the

first presumption arises and the facts sought to be established by the dependent presumption."

"Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. No inference of fact or of law is reliable drawn from premises which are uncertain. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves presumed.

"Starkie on Evidence, p. 80 lays down the rule thus: 'In the first place, as the very foundation of indirect evidence is the establishment of one or more facts from which the inference is sought to be made, the law requires that the latter should be established by *direct* evidence, as if they were the very facts in issue.' It is upon this principle that courts are daily called upon to exclude evidence as too remote for the consideration of the jury. The law requires an open, visible connection between the principal and evidentiary facts and the deductions from them, and does not permit a decision to be made on remote inferences. (Best on Evid., 95.) A presumption which the jury is to make is not a circumstance in proof; and it is not, therefore, a legitimate foundation for a presumption. There is no open and visible connection between the fact out of which the first presumption arises and the fact sought to be established by the dependent presumption."

Douglas v. Mitchell, 35 Penn. St, 440, 446, 447.

"Presumptions must be based upon facts, and cannot be drawn from other presumptions."

19 Am. & Eng. Enc. of Law, 39, and note 3.

"Legal presumptions must be based upon a fact, and cannot be based upon presumptions; consequently where the sheriff does not levy the whole debt there will not be any presumption that there was no more property in the county, as this would be basing a presumption upon the presumption that the sheriff did his duty."

Pennington v. Yell, 52 Am. Dec., 262.

The fair deduction from the foregoing authorities is, that before a person can be visited with the penalty of laches for not making timely investigation, he must have had some actual knowledge or information of a fact which would lead an ordinarily prudent man to make the investigation. And this actual knowledge or information of some fact cannot be supplied by a general presumption of law, (based upon no fact) that the person is acquainted with the law, and therefore knows his rights in the premises, such presumption being false in fact. Therefore the complainants are not fixed with notice of their rights by any presumption of law, and they are guilty of no laches for not acting upon an artificial knowledge falsely attributed to them by the law.

XVI.

THE DEFENDANTS HAVE BEEN GUILTY OF NEGLIGENCE IN ACQUIRING A TITLE WHICH THE PUBLIC RECORDS SHOWED TO BE DEFECTIVE

The public records of Ramsey County, Minn., to-wit, the office of the Register of Deeds of said County, in Vol. C. of Deeds, page 288, contained the following patent bearing date the 20th day of March, 1850:

"*The United States of America*

To all whom these presents shall come—GREETING:

Know ye, that in pursuance of an act of Congress entitled 'An act to raise for a limited time an additional military force and for other purposes,' approved February 11th, 1847, Elizabeth Remsen, widow, Harriet A. Remsen, Mary Ann Remsen, John W. Remsen, Elizabeth Remsen and George W. A. Remsen, children, heirs-at-law of George W. Remsen, deceased, late a private, Company H, Third Regiment United States Infantry, having deposited in the General Land Office a warrant in their favor numbered 28811: there is therefore granted by the United States unto Nathan C. D. Taylor, assignee of said Elizabeth Remsen in her own right, and as *guardian of the aforesaid minor heirs*, and to his heirs, the southwest quarter of section twenty-eight in township twenty-nine, north of range twenty-three west, in the district of lands subject to sale at Stillwater, Territory of Minnesota, containing one hundred and sixty acres, according to the official plat of the survey of the said land returned to the General Land Office by the Surveyor-General, which said tract has been located in satisfaction of the aforementioned warrant in pursuance of the Act of Congress above mentioned, approved February 11th, 1847. To have and to hold the said quarter section of land with the appurtenances thereof unto the said Nathan C. D. Taylor, and to his heirs and assigns forever.

In testimony whereof, I, Zachary Taylor, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington on the twentieth day of March, in the year of our Lord one thousand eight hundred and fifty, and of the Independence of the United States the seventy-fourth.

By the President:

[Probate Court Seal].

Z. TAYLOR,

BY THOS. EWING, JR., *Secretary.*

N. SARGENT,

Recorder of the General Land Office."

Recorded Vol. 17, page 385.

This patent referred to the land warrant which had been issued by the United States Government to Elizabeth Remsen, widow, and Harriet A. Remsen, Mary Ann Remsen, John Wesley Remsen, Elizabeth Remsen and George W. A. Remsen, minor heirs of George W. Remsen, under the act of Congress of Feb. 11th, 1847. It did *not* recite any authority from the Orphans' Court to the guardian of the said minor heirs to assign the said land warrant, although the statute referred to expressly required such authority to be given to the guardian before the warrant could be sold.

An examination of the assignment of the warrant in the General Land Office in Washington would have disclosed the fact that the assignment was made by the guardian appointed by the Orphans' Court of the cityand county of Philadelphia, and that no authority from the said court for the assignment is recited therein, and that no such authority was filed in the General Land Office.

The following is a copy of the assignment:

"For value received, we, Elizabeth Remsen, widow, for myself and as guardian of the persons and estates of Mary Ann Remsen, John Wesley Remsen, Elizabeth Remsen and George W. A. Remsen, minor children of George W. Rensen, deceased, duly appointed by the Orphans' Court of the city and county of Philadelphia, and Harriet A. Remsen, do hereby sell and assign unto Nathan C. D. Taylor all our right and title, and all the right and title of the said minor children to the within certificate or warrant, No. 28811, for one hundred and sixty acres.

"Witness my hands this eleventh day of October, 1848, at Philadelphia, in the State of Pennsylvania.

"ELIZABETH (her X mark) REMSEN,
"*For Myself and as Guardian of the Minor Children of*
"*George W. Remsen, Deceased.*
"HARRIET A. REMSEN.

"Attest:
"ISAAC BOILEAU,
"WM. F. SMALL.

"Acknowledged before me this eleventh day of October, 1848, at Philadelphia, in the State of Pennsylvania.

"ISAAC BOILEAU,
"*Alderman and Justice of the Peace.*"

The Orphans' Court having jurisdiction in the premises is thus pointed out. An examination of the records of this court would have disclosed the absence of any authority from such court to said guardian to make the said assignment; and thus would have been

demonstrated the invalidity of the assignment and the fatal defect in the title of Nathan C. D. Taylor, the assignee.

The complainants maintain that it was the duty of the intending purchasers to make this search, and that they are conclusively presumed to know what would certainly have been discovered upon a proper search in the records.

"Not only are the recitals in the conveyance under which a vendee holds immediately binding upon him, but he is also bound to give heed to the recitals in prior instruments which are necessary to complete his chain of title, and will be affected with notice of those facts to which such recitals refer. This principle applies not only to recitals in deeds and mortgages, but includes those in wills and records, without which the title could not be deduced. This general doctrine is thus stated by Leonard, C., in *Cambridge Valley Bank* v. *Delano*, 48 N. Y., 326: 'The principle of equity is well established that a purchaser of land is chargeable with notice, by implication of every fact affecting the title which would be discovered by an examination of the deeds or other muniments of title of his vendor, and of every fact as to which the purchaser with reasonable diligence or prudence ought to be acquainted. If there is sufficient contained in any deed or record which a prudent purchaser ought to examine to induce an inquiry in the mind of an intelligent person, he is chargeable with knowledge or notice of the facts so contained.' And by Earl, C., this language is used: 'I think the following definition of constructive notice is sufficiently guarded to furnish a safe rule in most, if not all, cases. Where a purchaser has knowledge of any fact sufficient to put a prudent man upon an inquiry, which, if prosecuted with ordinary diligence would lead to actual notice of some right or title in conflict with that he is about to purchase, it is his duty to make the inquiry, and if he does not make it, he is guilty of bad faith or negligence to such an extent that the law will presume that he made it, and will charge him with the actual notice he would have received if he had made it."

Williamson v. Brown, 15 N. Y., 354.
Baker v. Bliss, 39 Id., 70.

"A vendee is affected with *notice* of the recitals contained in the written instruments forming his chain of title."

Stidham v. Matthews, 29 Ark., 650.
Baker v. Mather, 25 Mich., 51.
Burrous v. Roulhac's, Adm'x, 2 Bush., 39.
Payne v. Abercrombie, 10 Heisk., 161.
Willis v. Gay, 48 Tex., 463; S. C., 26 Am. Rep., 328.
Blaisdell v. Stevens, 16 Vt., 179.
White v. Foster, 102 Mass., 375.

Johnson v. Thweatt, 18 Ala., 741.
Boggs v. Varner, 6 W. and S., 469.
French v. Loyal Company, 5 Leigh, 627.
Sergeant v. Ingersoll, 15 Pa. St., 343.
Corbett v. Clenny, 52 Ala., 480.
Honore's Ex'r v. Blackwell, 6 B. Mon., 67.
Thornton v. Knok, Id., 74.
Deason v. Taylor, 53 Miss., 697.
Gress v. Evans, 1 Dak. Ter., 387.
Woods v. Krebbs, 30 Gratt, 708.

In *Burrus* v. *Roulhac's Adm'x*, 2 Bush., 39, the purchaser affected with notice bought at an execution sale of the land in discharge of the lien of one of two notes recited in the debtor's conveyance, and such purchaser was decided to hold the land subject to the lien of the other note. And so where one claims under a sheriff's sale against an enterer, as his title could be made out only by reference to the land office books, where the entry was shown, the law will impute to the purchaser knowledge of an assignment of the certificate of entry by his judgment debtor before the judgment, where such assignment is disclosed by the books of that office.

Martin v. Nash, 31 Miss., 324.

"A purchaser is chargeable with notice of everything that appears on the face of the deeds constituting his chain of title."

Burch v. Carter, 44 Ala., 115.
Pringle v. Dunn, 37 Wis., 449.
Cordova v. Hood, 17 Wall., 1.

"A recital in a deed forming a link in the chain of title of any facts, which should put a subsequent grantee or mortgagee upon inquiry, and cause him to examine other matters by which a defect in the title would be disclosed in constructive notice of such defect."

Acer v. Westcott, 46 N. Y., 384.
Cambridge Bank v. Delano, 48 Id., 326.

"The rule that a grantee always takes with constructive notice of whatever appears in the conveyances constituting his chain of title applies to a prior unrecorded mortgage referred to in the second mortgage."

Baker v. Mather, 25 Mich., 51.

"Where the defendant claims title through a deed which coutains a covenant to recovery, he is chargeable with constructive notice of such covenant."

Van Doren v. Robinson, 16 N. J. Eq., 256.

"From the time a conveyance is delivered to the clerk for record it is notice to all subsequent purchasers."

Mut. Life Ins. Co. v. Dake, 87 N. Y., 257.
Polin v. Mundell, 27 Kans., 138.
Brookes' Appeal, 64 Penn. St., 127.
Pringle v. Dunn, 37 Wis., 449.
Glader v. Thomas, 89 Penn. St., 343.
Polk v. Cosgrove, 4 Biss., 437.
Oats v. Walls, 28 Ark., 244.

It is well settled that a purchaser is conclusively presumed to have notice of every fact which is disclosed by the records constituting the chain of title under which he holds: See note to *Lodge* v. *Simonton*, 23 Am. Dec., 48–61, in which note the general subjects of notice and of circumstances sufficient to put a purchaser upon inquiry are discussed. The subject of constructive notice is also treated in the note to *Parker* v. *Conner*, 45 Am. Rep., 184–190.

McPherson v. Rollins, 1 Am. St. Rep., 826, and note.

"One who takes a mortgage upon real property has constructive notice of every fact which could have been ascertained by an inspection of the deeds and mortgages on record in the chain of title. Though one of these mortgages is apparently satisfied of record, yet an intending mortgagee must take notice of all the facts appearing therefrom, and from the entry of satisfaction thereof.

"A purchaser of property is bound to act as an ordinary careful man would under the circumstances, and when he acts in contravention to the dictates of reasonable prudence, and refuses to inquire when the propriety of inquiry is naturally suggested by the circumstances known to him, he is chargeable with notice of the facts which such an inquiry would have disclosed."

Kirsch v. Tozier, 143 N. Y., 390; 42 Am. St. Rep., 729, and note.

"If a contract is referred to in a recorded mortgage, all persons claiming under it take with notice of such contract."

National Bank v. Morris, 114 Mo., 255.
35 Am. St. Rep., 754, and note.

"Parties are bound, in the absence of fraud to take notice of facts exhibited in a public record."

Backer v. Pyne, 130 Ind., 288.
30 Am. St. Rep., 231, and note.

"It is the settled doctrine in equity,—that whatever is considered as sufficient to put a person on inquiry, is considered as conveying notice; for the law imputes to a person knowledge of a fact, of which the exercise of ordinary prudence and diligence must have apprised him."

Booth v. Barnum, 9 Conn., 286.

"Whatever is sufficient to put a person on inquiry, is considered in equity as conveying notice."

Sigourney v. Munn, 7 Conn., 324.

"Whatever puts a party on inquiry, amounts to notice, provided the inquiry becomes a duty (as it always is with a purchaser), and would lead to the discovery of the requisite fact, by the exercise of ordinary diligence and understanding."

Hill v Epley, 31 Pa. St., 331.

"Whatever is sufficient to put a party on inquiry, is good notice in equity to that party."

Smith v. Low, 1 Atkins Rep. (Eng.), 489.

"Whatever is sufficient to put a party upon inquiry, is good notice in equity."

Ringgold v. Bryan, 3 Md. Ch., 488.

"Whatever is sufficient to put a party upon inquiry which would lead to the truth is, in all respects, equal to, and must be regarded as, notice. If a subsequent purchaser acts in bad faith, and wilfully or negligently shuts his eyes against those lights which, with proper observation, would lead him to a knowledge of facts affecting the subject of his purchase, he will be held to have notice of such facts."

Chicago v. Kennedy, 70 Ill., 350

"Whatever is notice enough to excite attention and put a party on his guard and call for inquiry, is notice of everything to which such inquiry might have led, and every unusual circumstance is a ground of suspicion and prescribes inquiry."

Russell v. Danson, 76 Ill., 167.

"Notice to a purchaser of property of the existence of liens or incumbrances thereon, is sufficient, in the absence of explanation, to charge him with notice of any and all liens or encumbrances which an inquiry would have disclosed. It is not necessary in such a case to show actual notice of the particular instrument creating a lien to deprive him of the character of a *bona fide* purchaser."

Reed v. Gannon, 50 N. Y. Rep., 345.

In *Parker* v. *Connor*, 93 N. Y., 118, at 124, Rapallo, J., says:

"The doctrine of constructive notice has been most generally applied to the examination of titles to real estate. It is the duty of a purchaser of real estate to investigate the title of his vendor, and to take notice of any adverse rights of equity of third persons which he has the means of discovering and as to which he is put on inquiry. If he makes all the inquiry which due diligence requires, and still fails to discover the outstanding right, he is excused; but if he fails to use due diligence, he is chargeable, as matter of law, with notice of the facts which the inquiry would have disclosed. (*Williamson* v. *Brown* 15 N. Y., 354, and cases cited; *Acer* v. *Westcott*, 46 id., 354; 7 Am. Rep., 355). The questions in such cases are, first, whether the facts were sufficient to put the party on inquiry; and second, did he fail to exercise due diligence in making the inquiry? An affirmative answer to these two questions charges the party with notice as matter of law."

The result of the application of these authorities is that these defendants have been guilty of gross laches in purchasing the complainants' property without an investigation of the title, and they are fixed with constructive notice of the complainants' equity.

The defendants complain that they cannot be put *in statu quo*. Suppose this is so. Is it any reason why they should not be required to surrender to the true owners what does not belong to them? But it is proposed by the complainants, that the land shall be charged with the cost of the improvements which the defendants have placed upon it. The result will be, that those who have expended money in betterments thereon will receive back their money, and purchasers of land will, each in his turn, have recourse upon the warranties of their deeds. Fortunately for them, the Tatum estate, through whom they all derive title, is abundantly able to respond to their calls, as was stated on the argument and not controverted. They will not be permitted to retain the profits which have accrued from the increase of the value of the land itself. To this they have no legal or moral right.

There may be some features of hardship in this case. But hard cases are the quick-sands of the law; and such appeals will have no influence upon this court. The principles of justice are immutable. Their application to the facts of the case at bar will be made without regard to consequences. *Fiat justicia ruat coelum.*

In many cases it is a question which of two comparatively innocent parties must suffer. When a loss must fall on one or the other of them, the one who is the least innocent must bear it, although the court would desire, if it were possible, to relieve them both.

In the present case, it is not a difficult question to decide, whether the complainants, whose only fault is their inevitable ignorance and their poverty, or the defendants, intelligent, wealth and powerful, who have blindly purchased a title which the record shows worthless, are least innocent.

JOHN W. HINSDALE,
Solicitor and of Counsel for Appellants.

Raleigh, N. C., January 31, 1898.